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Administrative Conference of the United States

Recommendations and Reports

1983

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Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished through direct action on the part of the affected agencies or legislative changes.

Administrative Conference of the United States

Recommendations and Reports

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RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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RECOMMENDATION 83-1:
THE CERTIFICATION REQUIREMENT IN THE CONTRACT DISPUTES ACT

(Adopted June 9, 1983)

The Contract Disputes Act, 41 U.S.C. 601-613, enacted in 1978, established a comprehensive system for resolving disputes arising out of federal government contracts. Under the Act, disputes initiated by or brought against executive branch agencies relating to a contract must first be submitted in writing to the agency's contracting officer for decision. Appeals from that decision may then be taken either to an agency board of contract appeals or to the United States Claims Court.

The Act specifies in section 605(c) that claims submitted to the contracting officer by a contractor for more than $50,000 must be certified: "the contractor shall certify that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable." It is generally recognized that this requirement was inserted to discourage the submission of frivolous or unwarranted contractor claims. (Defense contractor claims are also subject to a second certification requirement, contained in section 813 of the Department of Defense Appropriation Authorization Act, P.L. 95-485, that predates the Contract Disputes Act. It requires a similar certification, but applies only to claims exceeding $100,000.)

Decisions by the Court of Claims* have held the certification requirement in the Contract Disputes Act to be jurisdictional. The Court has ruled that unless a contractor has presented a proper certification to the contracting officer prior to the officer's decision, any such decision is a nullity, and the court will dismiss any appeal based on such a decision. Moreover, the Court has intimated in dicta that agency boards of contract appeals should likewise dismiss appeals from decisions on uncertified claims—a position followed in several board decisions.

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* The Court of Claims has been replaced by the United States Claims Court and the Court of Appeals for the Federal Circuit (P.L. No. 97-264). However, the Claims Court has adopted the decisions of the Court of Claims as binding precedent. General Order No. 1, United States Claims Court, preceding Rule 1, Rules of the United States Claims Court, 28 U.S.C.A. (October 7, 1982). The Court of Appeals for the Federal Circuit has also adopted the decisions of the Court of Claims as precedent, subject to its power to overrule earlier holdings when sitting en banc. South Corp. v. (Continued)

This formalistic approach presents significant problems for contractors. Sometimes a contractor cannot state the exact amount of a claim at the time the claim first arises because damages have not fully accrued or because the necessary information is otherwise unavailable. Also, a contractor who believes his certification is correct when made may later discover new information affecting the amount of the claim. In these situations, under existing law, the contractor may have to return to the starting point of the whole process, at the cost of delay and added expense, if he seeks to amend his certification. Contractors have also been required to begin again, even when their cases have reached the Court of Appeals for the Federal Circuit, when contracting officers have issued decisions before receiving certification.

The Conference believes that the certification requirement serves a valid purpose — that of discouraging frivolous or unwarranted claims. However, this purpose can be achieved in the context of a more flexible certification requirement. When the exact amount of a claim is not definitely known, a contractor should be permitted to certify the validity of his claim without specifying an exact amount, providing instead his best estimate of the amount along with an explanation of why the exact amount cannot be stated. Customary standards of proof should continue to apply in establishing the precise measure of liability, including the protections available under section 604 of the Contract Disputes Act and 18 U.S.C. 1001. Where a matter is later appealed to a board of contract appeals or the Claims Court, that body should require the contractor to state an exact amount before trial on the merits.

In addition, if for any reason a contractor has failed to make certification at the proper time or in the proper amount, this failure should not automatically nullify any action already taken on the contractor's claim. On a finding that the interests of justice so require, the contracting officer, board of contract appeals, or Claims Court should have authority to permit the contractor to

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United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

make or amend the certification at any time before that officer or reviewing body issues a decision on the claim.

The $50,000 threshold, coupled with the jurisdictional certification requirement, also creates some problems. A contractor who files an uncertified claim, believing it to be worth less than $50,000, and who then discovers that the value is higher may have to start the process over, regardless of any decision by the contracting officer. Moreover, the benefits of certification apply equally to claims above $50,000 and those below that figure. If the certification requirement is modified as suggested above, the $50,000 threshold for certification should be eliminated.

This recommendation does not address the question of when interest should begin to accrue on a contractor's claim. Congress should examine this question in connection with its consideration of this recommendation.

RECOMMENDATION

1. Congress should amend section 605(c) of the Contract Disputes Act to provide that:

> (a) when the contractor believes that the exact amount of a claim cannot be determined at the time the claim is filed, the certification shall include the contractor's best estimate of the amount of the claim and an explanation of why the exact amount cannot be stated, provided, however, that the Claims Court or board of contract appeals shall set a date a reasonable time before trial on the merits of the claim for the filing of a statement of the exact amount of the claim;
>
> (b) on an express finding that justice so requires, the contracting officer, the board of contract appeals, or the Claims Court may permit certification to be made or amended at any point up to the issuance of their respective final decisions on the claim;
>
> (c) this revised certification requirement should apply to all claims, not just those over $50,000.

2. The certification requirement contained in Section 813 of the Department of Defense Appropriation Authorization Act of 1979, P.L. 95-485, should either be eliminated or conformed to the requirement recommended in paragraph 1.

RECOMMENDATION 83-2:
THE "GOOD CAUSE" EXEMPTION FROM APA RULEMAKING REQUIREMENTS

(Adopted June 10, 1983)

The Administrative Procedure Act (APA) provides for public participation in agency rulemaking. The Act's minimum requirements for informal rulemaking are notice and an opportunity to comment on proposed rules. The advantages of public participation in agency rulemaking are widely recognized: the agency benefits because interested persons are encouraged to submit information the agency needs to make its decision; the public benefits from an opportunity to participate in shaping the final agency action. Congress recognized, however, that in some situations the normal public participation procedures should not be required. Consequently, the APA contains a number of exemptions, including a "good cause" exemption which allows agencies to dispense with notice and comment if those procedures are "impracticable, unnecessary, or contrary to the public interest."*

Experience has confirmed the need for a "good cause" exemption from the APA's notice and comment requirements. The situations in which the exemption is invoked are diverse, and it is not feasible to identify them all in advance. Some recurring examples of the types of situations requiring use of the exemption are those in which (1) advance notice of rulemaking will defeat the regulatory objective, (2) immediate action is necessary to reduce or avoid health hazards or imminent harm to persons or property, (3) immediate action is required to prevent serious dislocation in the marketplace, and (4) delay in promulgation will cause an injurious inconsistency between an agency rule and a newly enacted statute or judicial decision. A survey of court opinions in cases involving challenges to agency invocation of the good cause exemption shows that agencies generally have used the exemption with due regard to Congress' admonition that exemptions from section 553 requirements be construed narrowly.

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* 5 U.S.C. § 553(b)(3)(B). The Administrative Conference has already addressed other exemptions from notice-and-comment rulemaking procedure: Recommendation 69-8 (proprietary matters); Recommendation 73-5 (military and foreign affairs functions), and Recommendation 76-5 (interpretive rules and statements of general policy).

However, experience with the good cause exemption also underscores the value of public participation in rulemaking. The risk of error is heightened when an agency acts summarily, and some rules promulgated under the good cause exemption have been based on faulty or inadequate information and have produced unanticipated and undesirable effects. Public participation probably would have led to better decisions in these cases, and it might also have increased interested persons' perceptions of the fairness of the rulemaking process as well as their acceptance of the rule.

The Administrative Conference's study of the good cause exemption coincides with a reexamination of the exemption by the Congress. In the 97th Congress, the Senate passed a regulatory reform bill (S. 1080) that, among other things, would have amended the good cause exemption as follows: except for rules having an insignificant impact, an agency invoking the good cause exemption would be required to comply with public participation requirements to the maximum extent feasible prior to promulgation and to fully comply after promulgation. A bill introduced in the House of Representatives in the 98th Congress (H.R. 1776) would make rules adopted under the good cause exemption interim rules that cease to be effective unless replaced by permanent rules within a prescribed period of time.

The Administrative Conference recommends that agencies provide a post-promulgation comment opportunity for rules they adopt under the good cause exemption. This opportunity should be provided whether the agency invokes the exemption on its own initiative or in response to a statutory or judicial requirement. The post-promulgation comment opportunity will give interested persons a chance to expose any errors or oversights that occurred in the formulation of the rule and to present policy arguments for changing the rule. The agency should publish a response to any relevant and significant comments, as well as its reasons for changing or not changing the rule in light of the comments. The responsive statement should be published within a reasonable time after receipt of public comments, taking into account the nature and number of comments and the agency's other responsibilities. Of course, the agency's decision to amend or repeal the rule, or its decision to deny commenters' requests for changes, will be judicially reviewable under the APA.

The Conference recommends, however, that the post-promulgation comment opportunity not extend to rules for which the agency determines public procedure to be "unnecessary," as that term has been interpreted by courts. Generally, courts have applied the "unnecessary" ground to rules that are minor or merely technical amendments in which the public has little interest; they generally have not upheld its application to rulemaking involving agency discretion on matters having a substantial impact on the public. Finally, in Paragraph 3, the Conference advises agencies to consider other measures that might appropriately be employed in particular rulemakings under the good cause exemption.

In making this recommendation, the Conference cautions agencies against more readily invoking the good cause exemption on the belief that the post-promulgation comment opportunity will be an adequate substitute for the opportunity to comment prior to adoption of a rule. Comment after promulgation is less likely to cause an agency to reconsider the basic policy choices it made in formulating the rule. And even if the agency does reconsider the basis of the rule, it may be impossible to reverse the effects of a rule that is already in place.

RECOMMENDATION

1. Agencies adopting rules under the good cause exemption in the Administrative Procedure Act should provide interested persons an opportunity for post-promulgation comment when the agencies determine notice and comment prior to adoption is "impracticable" or "contrary to the public interest." However, a post-promulgation comment opportunity should not be required when the agency determines public procedures are "unnecessary" as that term has been interpreted by courts reviewing agency use of the good cause exemption.

2. To implement paragraph 1, agencies should:

   (a) publish a notice of the post-promulgation comment opportunity in the Federal Register along with the rule and the agency's statement of reasons for its finding of good cause;

   (b) give interested persons an appropriate period of time to submit comments on the rule, and

   (c) within a reasonable time after close of the comment period, publish a statement in the

Federal Register indicating the agency's adherence to, or plans to change, the rule and include in the statement a response to significant and relevant issues raised by the public comments.

3. In addition to the post-promulgation comment procedures specified in paragraph 2, agencies adopting rules under the good cause exemption should consider:

(a) framing the rule as narrowly as possible while still accomplishing the regulatory objective;

(b) using notice and comment procedure to develop general criteria to be applied by the agency in foreseeable, recurring situations that require emergency action;

(c) promulgating the rule as an interim rule, to be followed by an amended rule promulgated after complying with notice and comment requirements; and

(d) taking appropriate alternative steps to obtain the views of interested persons before adopting the rule.

4. If Congress amends the good cause exemption in 5 U.S.C. § 553(b), it should impose requirements no more stringent than are here recommended.

RECOMMENDATION 83-3: AGENCY STRUCTURES FOR REVIEW OF DECISIONS OF PRESIDING OFFICERS UNDER THE ADMINISTRATIVE PROCEDURE ACT

(Adopted December 15, 1983)

This recommendation is addressed to the organizational structures which agencies establish to review decisions of presiding officers (ordinarily, administrative law judges) in proceedings governed by sections 556 and 557 of the Administrative Procedure Act or otherwise involving agency determinations on the record after opportunity for a hearing. It is based on a study of structures now in use and their relationship to the accuracy, efficiency and acceptability of the adjudicatory process.

The study concludes that variations in the characteristics and numbers of adjudicatory proceedings in different agencies and in the organization and functions of such agencies caution against recommending any single structure for review of adjudicatory decisions made by presiding officers. By and large the present review structures in the agencies studied seem well adapted to the particular circumstances of the agency. Consequently, the purpose of this recommendation is not to effect any drastic change in present structures, but to provide general guidance to agencies which are establishing new review structures or revising present ones.

In selecting among possible structures for review of adjudicatory decisions four basic precepts should be kept in mind. The first two involve considerations of efficiency; the others involve considerations of accuracy and acceptability.

First, efficiency is generally served by spreading the review load over a number of reviewers adequate to keep review time low relative to initial decision time. Application of this precept requires attention to three variables: the total relevant adjudicatory caseload, the difficulty of the cases, and the number of reviewers.

Second, efficiency also is served by minimizing repetition; the same matter seldom should be put in issue more than once. This cautions against de novo review, instead favoring more limited review of issues properly committed to a subordinate.

Third, accuracy depends on matching the skills of the reviewer to the issues presented. Officials integrated into the agency's policymaking apparatus should review decisions that significantly involve policy issues while officials trained in factfinding should review decisions presenting fact issues. Furthermore, the level of the reviewer should match the magnitude of the issue. Agency heads with numerous other responsibilities should be insulated from routine cases, but attempts to force resolution of major policy issues at lower levels seem misguided except when those issues can readily be addressed by rulemaking. Similarly, individual reviewers easily can address relatively simple issues, whether of fact or of policy, while more complex questions may call for collegial consideration.

Fourth, acceptability generally requires that some review by a higher agency authority be available at the instance of the aggrieved party, at least in cases of great impact on individual parties. Imposition of a substantial penalty and removal of a valuable government benefit are obvious candidates for review as of right.

RECOMMENDATION

1. Agency Head Review

a. In drafting legislation governing the institutional structure for agency adjudicatory proceedings, Congress should favor delegation of decisional authority and should not prescribe detailed review structures. The presumption should be that each agency head is best able to allocate review functions within the agency.

b. Congress should authorize agency heads* —

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* "Agency head" is used in the functional sense of the individual or body politically responsible for the administration of the program in question whether this responsbility is vested by statute or by delegation from a superior official, such as the Secretary of a department.

(i) to review initial decisions of presiding officers in adjudicatory matters on a discretionary basis, as described in Administrative Conference Recommendation 68-6, section 2(b); and

(ii) to delegate review authority on an ad hoc basis or with respect to any or all classes of decisions to a subordinate official or board of officials either with possibility for further review by the agency head in his discretion or without further administrative review.

Where the agency head retains the right of discretionary review of an initial or intermediate decision, the agency should provide by regulation the grounds and procedures for invoking such review, in accordance with the guidelines set forth in section 2(b) of this Recommendation.

c. Only in the rarest circumstances should Congress require agency heads to review decisions personally. These circumstances are where:

(i) in the case of an agency headed by an individual, the subject matter at issue is of such importance that attention at the very highest level is imperative; or

(ii) in the case of an agency headed by a collegial body, the subject matter at issue is of special importance, the cases comprising the relevant class of decisions are few in number, and the agency either has no other significant non-adjudicatory functions or has few such functions and has a sufficient number of members adequately to perform review and other tasks. This paragraph does not address requirements for discretionary review procedure under which a case may be brought before the agency for review on the vote of one or more members of the agency.

Nothing in this section is intended to deal with the appropriate allocation of responsibilities between the agency head and his subordinates in connection with the decisions in cases which he personally reviews.

2. Forms of Delegations.

a. General. Agency heads having powers of delegation should delegate review authority on a class, rather than case-by-case, basis whenever a substantial number of cases is adjudicated at the agency. Delegations on an ad hoc basis should be limited to situations where adjudicatory proceedings are relatively few and of such varied nature as to make selection of a single qualified reviewing authority difficult.

b. Reservation of Authority. Where an agency head delegates review authority, any authority he retains to grant further review should normally be exercisable only in his discretion on a showing that important policy issues are presented or that the delegate erroneously interpreted agency policy. Multilevel review of purely factual issues should be avoided.

3. Choice of Delegate. When an agency head determines to make a standing delegation of his review authority, either unconditionally or subject to further discretionary review, he may choose between delegating to a subordinate authorized to act individually, e.g., a judicial officer, or to an employee board authorized to act collegially. A multi-member agency might also delegate to one of its members or a panel made up of its members. In choosing the form of reviewing authority, the agency head should consider the function to be performed by the authority and the degree of finality expected of its decisions. This section sets forth some factors which may guide an agency head in his choice among these forms. The list is not intended to be exclusive, nor to suggest that in every case there are clear grounds for preferring one form to another.

a. Individual Delegates. Where a standing delegation of review authority is to be adopted, the following factors favor a delegation to an individual delegate (or to a number of delegates authorized to review decisions individually) rather than to several delegates acting jointly: the number of cases is large, the cases are relatively simple, and the predominant issues concern descriptive facts, or, to the extent complex issues are presented, their resolution generally depends on application of a single skill or discipline, such as legal interpretation, or application of knowledge uniquely associated with the medical or engineering professions or with a discrete branch of science rather than on some combination of skills or disciplines.

b. Review Boards. In deciding whether a delegation instead should be made to a group of persons jointly charged with review of ALJ decisions, among the factors that should be considered as favoring such delegation are: the caseload is substantial (but somewhat less than that contemplated by paragraph (a) above), and includes more complex cases that consume a significant amount of time at the initial decision stage, and cases presenting a class of issues dependent for resolution on the application of several different skills or disciplines.

c. Agency Panels. In some circumstances, a multi-member agency may find it desirable to make a standing delegation of review authority to a panel of agency members. Factors favoring such delegation include a large adjudicatory caseload and difficulty in elaborating or clarifying agency policy (especially through formal mechanisms such as rulemaking) in a manner that will substantially limit the number or significance of policy issues presented in adjudications.

4. Standards for Grant of Review.

a. Review of Right; Discretionary Review Delegation of review authority does not necessarily imply that such review must be available as of right. While review of right is appropriate in certain cases because of the severe consequences to the parties, such as cases involving the imposition of a substantial penalty or the revocation of a license, agency heads should consider the desirability in routine cases of authorizing the review authority to decline review in the absence of a reasonable showing that:

(i) A prejudicial procedural error was committed in the conduct of the proceeding, or

(ii) The initial decision embodies (i) a finding or conclusion of material fact which is erroneous or clearly erroneous, as the agency may by rule provide; (ii) a legal conclusion which is erroneous; or (iii) an exercise of discretion or decision of law or policy which is important and which should be reviewed.

b. Review Sua Sponte. Normally, a reviewing authority should call up a case for review *sua sponte* only where policy issues are involved and the functions of that authority include the resolution of such issues.

RECOMMENDATION 83-4:

THE USE OF THE FREEDOM OF INFORMATION ACT FOR DISCOVERY PURPOSES

(Adopted December 16, 1983)

The Freedom of Information Act (FOIA) and discovery provide separate mechanisms for obtaining the disclosure of Government documents. Any person may invoke at any time the release provisions of the FOIA by requesting an agency to disclose any reasonably described agency records. A requester's need for the records and his purpose in making the request normally do not affect the right to obtain disclosure. The agency must release the records unless they fall within one of the nine exemptions specified in the Act. On the other hand, a person may obtain the disclosure of Government documents through discovery only if he is a party to a judicial or administrative proceeding and if the procedural rules governing the proceeding include provisions for discovery. If both these conditions are satisfied, the party may normally obtain from the Government through discovery unprivileged documents relevant to the subject matter of the pending proceeding.

The separate disclosure mechanisms established by the FOIA and by discovery serve different purposes. Congress' fundamental objective in enacting the FOIA was to permit the public to inform itself about the operations of the Government. All members of the public are beneficiaries of the Act because Congress' goal was a better informed citizenry. A requester's rights under the Act are therefore neither diminished nor enhanced by his status as a party to litigation or by his litigation-generated need for the requested records. Discovery, on the other hand, serves as a device for narrowing and clarifying the issues to be resolved in litigation and for ascertaining the facts, or information as to the existence or whereabouts of facts, relevant to those issues. In the discovery context, a party's litigation-generated need for documents does affect the access available to him and may result in the disclosure to him of documents not available to the public at large.

Discovery does in fact provide parties to litigation with the more reliable mechanism for obtaining from the Government the information which they need to prepare for trial or hearing.

Parties to litigation nevertheless sometimes use the FOIA for discovery purposes because they hope to obtain the release of additional agency records for use in litigation, or to obtain the release of records at an earlier time. Limitations on the availability of discovery explain these uses of the FOIA. Discovery is a pretrial procedure designed to permit the parties to a proceeding to prepare for trial or, if possible, to resolve the controversy without a trial. It is not designed to provide the parties with the level of access to Government documents furnished to the general public by the FOIA; and even the most generous rules of discovery do not always provide the parties with that level of access.

There are several limitations on the Government's disclosure obligations in the discovery context that account for use of the FOIA as a supplemental discovery device. First, discovery is normally available to the parties only after a proceeding has begun and then only for a short period of time before trial or hearing. Second, it may be used only to obtain documents that are relevant, or that may lead to information that is relevant, to the pending action. Recent reform efforts have sought to keep civil discovery in the federal courts within reasonable bounds by emphasizing that the purpose of discovery is not the disclosure of information but the simplification of the matters in dispute. More specifically, the 1980 and 1983 amendments to the discovery rules in the Federal Rules of Civil Procedure seek to prevent "overdiscovery" by increasing the trial judge's supervisory role. Less generous discovery is available in criminal proceedings than in civil actions; and, in some administrative adjudications, no formal discovery is available at all.

The Conference believes that the use of the FOIA for discovery purposes is a matter of valid concern to the Government because that use, unlike other uses of the FOIA, may disadvantage the Government's position in litigation in several ways. First, a party in litigation with the Government may obtain the release of agency records without the knowledge of Government counsel and then seek to use those records to surprise Government counsel at trial or hearing. Second, a party in litigation with the Government may disrupt the Government counsel's trial preparation by seeking, perhaps on the eve of the trial or hearing, the release under the FOIA of records in the Government's litigation files. In these cases, the Government counsel must divert attention from trial preparation in order to prevent a FOIA release to an opposing party of sensitive, nondisclosable records. Under the FOIA, unlike in discovery, the Government does not enjoy the protection of a cut-off date after which no further requests can be made. Third, a party in litigation with the Government may request production of the same documents under the FOIA and in discovery, thus necessitating duplicative searches and releases. In these cases, the Government's primary concern is not the extra burden imposed on the agency's public information office in processing the party's FOIA request, but the burden imposed on counsel representing the Government to protect himself from duplicative effort and to keep himself informed of the Government documents obtained by opposing parties.

Some recent proposals to amend the FOIA address the problem by temporarily denying the use of the FOIA to a party to a pending administrative or judicial proceeding where the agency records in question may be requested from the Government through discovery.* The Conference declines to take a position on these proposals, but prefers to endorse a relatively modest change in the law because the evidence is inconclusive that a substantial burden to the Government is caused by use of the FOIA for discovery purposes and because the proposals raise significant concerns of coverage (i.e., applicability to proceedings where discovery is limited) and enforceability.

If the FOIA does remain fully available to a party in civil litigation with the Government, the potential disadvantages to the Government will be at least partially alleviated by requiring the party to notify Government counsel of all FOIA requests made by or on behalf of the party for the purpose of obtaining information for use in that litigation. Through notice of these FOIA requests, Government counsel will be able to learn what records the agency is releasing in response to the requests. This should eliminate any danger of surprise at trial or hearing. Also, a simple inquiry to the other side or to the agency FOIA office at the inception of discovery can determine whether the party made any prior FOIA requests that relate to the litigation. Advance notice of a party's FOIA requests may also permit Government counsel to coordinate FOIA and discovery searches for the same records and to avoid duplicative searches. Counsel will therefore be in a stronger position to protect his litigation files, although he may still need to divert his attention from trial preparation in order to assist the agency's public information office in resisting the disclosure of exempt records.

Finally, courts have recognized that the FOIA should not be used to delay judicial or administrative proceedings.** The

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* See, e.g., S. 774, 98th Cong., 1st Sess. (1983).

** See, e.g., the "DeLorean case," United States v. United States District Court, Central District of California, 717 F. 2d 478 (9th Cir. 1983).

Conference believes that parties to litigation should not be able to use the FOIA to delay ongoing litigation in any fashion. Congress, or the courts and the administrative agencies through exercise of their rulemaking or decisional powers, may properly provide that pendency of a FOIA request, or of proceedings related to such a request, should not affect the progress of litigation to which the requested information may arguably pertain.

RECOMMENDATIONS

1. Congress should amend the Freedom of Information Act (FOIA) to require a party to a judicial action or to an administrative adjudication or formal rulemaking proceeding, to which the Government is also a party, to notify counsel for the Government promptly of any FOIA requests made by the party, by his counsel, or by some other person acting on the party's behalf, during the pendency of the proceeding for the purpose of securing the release of agency records that may be relevant to the proceeding.

2. Congress should also provide that, if a party does not comply with this notice requirement, the court or agency conducting the proceeding may preclude the party from offering in the proceeding any agency records released in response to the request.

BACKGROUND REPORTS
FOR
RECOMMENDATIONS
83-1 THROUGH 83-4

CERTIFICATION REQUIREMENTS UNDER THE CONTRACT DISPUTES ACT

by: Thomas J. Madden, Esq.
of
Kaye, Scholer, Fierman, Hays & Handler

I. INTRODUCTION

Contracts awarded by government agencies prior to the enactment of the Contract Disputes Act (CDA or Act)[1] in 1978 included mandatory clauses for resolution of disputes arising out of the performance of the contract. If the parties could not resolve these disputes through negotiations the government contractor could first ask the government contracting officer to resolve the dispute. An appeal could then be taken to the head of the contracting agency and this appeal was decided by an administrative body known as a board of contract appeals. A limited review of these decisions was allowed in the United States Court of Claims under the standards of the so-called "Wunderlich Act" which limited judicial review to a review of the administrative record before the board.[2]

With the passage of the CDA in 1978, Congress established a comprehensive new process for the resolution of disputes arising out of the performance of government contracts. Under the CDA, disputes by or against the government relating to a contract must be initially

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[1] Pub. L. No. 95-563, 92 Stat. 2383, 41 U.S.C. §§ 601-613.

[2] The Wunderlich Act provides in 41 U.S.C. § 321-22 as follows:

> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute

(Footnote Continued)

submitted to a contracting officer for decision.[3]
The CDA provides procedures for the resolution of disputes

(Footnote [2] Continued:)

> involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

The limits of the Wunderlich Act were defined in a series of Supreme Court decisions. See United States v. Carlo Bianchi and Co., 373 U.S. 709 (1963); United States v. Anthony Grace & Sons, Inc., 384 U.S. 424 (1966); United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966). The final decision of the Supreme Court construing the limits of the Wunderlich Act was S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972) where the Court held that the government had no right to appeal a board decision. Since the boards of contract appeals were operating as independent administrative tribunals, this created a somewhat anomalous situation for the government and led in part to the enactment of the CDA.

[3] The Contract Disputes Act applies to contracts made by executive branch agencies. It does not apply to contracts entered into by judicial and legislative branch agencies as well as certain other contracts. See G. Coburn, The Contract Disputes Act of 1978 at 10-11 (PLI 1982).

first by the government contracting officer and then either by an agency board of contract appeals[4] or by the United States Claims Court.[5] (Figure 1)

In a recent series of decisions the Court of Claims and its successor, the Court of Appeals for the Federal Circuit, have held that a contractor cannot secure judicial relief provided under the CDA for a claim over $50,000 unless it has first presented the claim in the proper form to the contracting officer.[6] By implication it has also concluded that the boards of contract appeals may deny relief on similar grounds. In so doing the courts have narrowed the threshold issue for the adjudication of claims to the physical form of the claim and not its substance. The formalistic approach taken in these cases portends significant problems for contractors seeking resolution of a broad range of claims where the quantum (dollar value) of the claim is not known with certainty at the time the claim actually arises or where the extent of the government's ultimate liability will not be known until long after the claim initially arises.

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[4] 41 U.S.C. § 606. If the appeal from the contracting officer's decision is taken initially to a board of contract appeals, the decision of the board may be appealed to the Court of Appeals for the Federal Circuit. 41 U.S.C. § 607, as amended by Pub. L. No. 97-164 (1982).

[5] 41 U.S.C. § 609, as amended by Pub. L. No. 97-164 (1982).

[6] See Paul E. Lehman, Inc. v. United States, 673 F.2d 352 (Ct. Cl. 1982); W. H. Moseley Co. v. United States, 677 F.2d 850 (Ct. Cl. 1982); Skelly & Loy v. United States, 685 F.2d 414 (Ct. Cl. 1982). Although the Court of Claims has been replaced by the Court of Appeals for the Federal Circuit and the Claims Court, its decisions will continue to be binding precedent. See South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982). More recently the Court of Appeals for the Federal Circuit stated that certification was one of the most "significant" provisions of the CDA and was a jurisdictional requirement. Fidelity Construction Co. v. United States, 700 F.2d 1379, 1384 (Fed. Cir. 1983).

II. CLAIMS, SUBMITTED CLAIMS, AND SUBMITTED CERTIFIED CLAIMS

The CDA does not define the terms "dispute" or "claim." However, in 41 U.S.C. § 605(a) the CDA authorizes contractors to submit claims to the contracting officer for decision. This subsection provides in part that:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. . . . The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor.

This subsection, which is the only place in the CDA where the Congress attempted to give some definition to a claim, only requires that a claim be in writing and be submitted to a contracting officer. Section 605(b) of the CDA also provides that the contracting officer's decision on a claim shall be final and conclusive and not subject to review unless an appeal is timely commenced as authorized by the Act.

In addition to providing for submission of written claims under subsection 605(a), the Act provides in 41 U.S.C. §§ 605(c)(1) and (c)(2) that:

> (c)(1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.
>
> (c)(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000--

> (A) issue a decision; or
>
> (B) notify the contractor of the time within which a decision will be issued. [Emphasis supplied.]

Certification is mentioned only in these two subsections and its principal effect would appear from the plain language of the statute to simply give the contracting officer the authority to set a date for resolution of "a submitted certified claim" beyond the 60-day limit provided for resolution of "any submitted claim of $50,000 or less." This is further suggested by subsection (c)(3) of section 605 which provides that:

> The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor. [Emphasis supplied.]

Subsections 605(c)(1), (2) and (3) make a clear distinction between submitted claims and submitted certified claims. For "any submitted claim of $50,000 or less," the contracting officer must issue a decision, if so requested in writing, within 60 days. On a "submitted certified claim over $50,000" the contracting officer either must issue a decision within 60 days or within that period notify the contractor when a decision will be issued. However, decisions on all submitted claims must be issued within a reasonable period of time under subsection 605(c)(3).

In determining what is a reasonable time for issuing a decision, the provisions of subsection 605(c)(3) allow the contracting officer to consider such factors as "the adequacy of the information in support of the claim provided by the contractor." Presumably, if a claim is not certified, the contracting officer can certainly consider the lack of certification in determining whether the information provided is adequate to support a claim.[7] The failure of a contractor to supply a certification, however, is but one factor which can be taken into consideration in determining whether or not there is adequate information to support a claim. Despite the conclusions reached by the courts in the certification cases,[8] there is nothing in the specific language of the CDA which indicates that the failure to supply a certification would be a per se basis for a contracting officer to refuse to act on a claim within a reasonable time. Furthermore, there is nothing in the express language of the statute which indicates that a contracting officer cannot issue a final decision on an uncertified claim over $50,000.[9]

The somewhat limited legislative history of the certification provision could also be read to support the interpretation suggested above. The requirement for certification was not in the initial bill reported by either the House or Senate committees responsible for the legislation. Rather, the certification requirement was added on the floor of the Senate.[10] The sponsor of the amendment, Senator Byrd, said that the certification requirement was added "'due to concern expressed by . . . [among others] Admiral Rickover' about time constraints."[11] The amendment clearly responded to these concerns about time constraints by allowing the contracting officer in subsection 605(c)(3) a "reasonable time" to resolve claims over $50,000.[12]

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[7] See Newell Clothing Company, ASBCA No. 24482, 80-2 BCA ¶ 14,774 (1980).

[8] Supra note 6.

[9] Indeed, the General Services Board of Contract Appeals prior to the decisions cited supra note 6, held that where a contracting officer has rendered a final decision on an uncertified claim after reviewing the data before him, it is apparent that certification was unnecessary. Piedmont-Courtland Associates, Ltd., GSBCA Nos. 5433, 5710, 81-1 BCA ¶ 15,004 (1981). Furthermore, contracting officers had issued final decisions on uncertified claims in each of the cases cited supra in note 6.

[10] Lehman, supra note 6, at 354-55.

III. THE CERTIFICATION REQUIREMENT AS INTERPRETED BY THE COURT OF CLAIMS

The Court of Claims and the Court of Appeals for the Federal Circuit have taken a very restrictive view of the meaning of certification in a series of cases brought under the direct review provisions of section 609 of the CDA. In Paul E. Lehman, Inc. v. United States,[13] the Court of Claims initially found that unless the certification requirement of subsection 605(c)(1) is met the court does not have the jurisdiction to consider a direct challenge to a contracting officer's decision. They also found that certification must occur before a contracting officer renders a final decision and that any decision by a contracting officer on an uncertified claim for more than $50,000 is a nullity since "[t]he contracting officer, . . . had no authority to waive a requirement that Congress imposed."[14]

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[11] Lehman, 673 F.2d at 352 (quoting 124 Cong. Rec. 36,267 (Oct. 12, 1978)). Admiral Rickover in his testimony at hearings on the legislation urged that a contractor be required to submit to the government a "certificate" with its claim. See Contract Disputes Act of 1978: Joint Hearings on S. 2292, S. 2787 & S. 3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 21 (1982). Written suggestions by Admiral Rickover were similar to the actual language of subsection 605(c)(1). 673 F.2d at 355.

[12] Certification is also intended to "discourage the submission of unwarranted contractor claims." See Lehman, 673 F.2d at 354. Accordingly, it would certainly be difficult to argue that a claim should actually be paid before a contractor submits a certification which meets the requirements of §§ 605(c)(1). As a practical matter, however, certification provides no greater assurance than existing law that a contractor is claiming funds to which it is entitled. See, e.g., 18 U.S.C. §§ 1001-1028 which establish a variety of civil and criminal penalties for such actions as making false statements to the government or submitting false claims to the government. See also United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982).

[13] 673 F.2d 352 (Ct. Cl. 1982).

In W. H. Moseley Co., v. United States,[15] the court reaffirmed its holding in Lehman and found that a contractor cannot establish jurisdiction in the court by certifying the claim after the final decision of the contracting officer. The court in Moseley also held that "to properly certify a claim a contractor must make a statement which simultaneously makes all of the assertions required by 41 U.S.C. § 605(c)(1)."[16]

Both Lehman and Moseley involved contracts entered into prior to enactment of the CDA and were before the court under a special provision of the CDA dealing with claims submitted under such contracts after the effective data of the Act.[17]

In Skelly & Loy v. United States,[18] the court dealt with a contract in which all the relevant events occurred after the effective date of the CDA and in which the CDA controlled all avenues of appeal available to the plaintiff. In Skelly & Loy, the court reaffirmed its holdings in the Lehman and the Moseley cases. It concluded that "any proceedings on an uncertified claim - under the CDA - are of no legal significance," and therefore, the process for reviewing claims under the Act "simply has not begun."[19]

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[14] 673 F.2d at 356.

[15] 677 F.2d 850 (Ct. Cl. 1982).

[16] 677 F.2d at 852. The Claims Court recently appears to have limited a further extension of Moseley by rejecting the government's arguments that a contractor had to append to the claim all documents referenced in the claim's statement of certification. Metric Construction Co., Inc. v. United States, 1 Cl. Ct. 383 (1983).

[17] This provision allows a contractor to choose to follow the Wunderlich Act procedure, supra note 2, or to use the procedures of the CDA. Once a contractor chooses to use the CDA procedures the contractor cannot later elect to have the claim processed under the Wunderlich Act. W.M. Schlosser Co. v. United States, 705 F.2d 1336 (Fed. Cir. 1983). The claims in Lehman and Moseley were processed under the CDA. 41 U.S.C. § 601 note.

[18] 685 F.2d 414 (Ct. Cl. 1982).

The holdings in Lehman, Moseley and Skelly & Loy, are at direct odds with the interpretation of the certification requirements suggested above. This may be in part because the court never analyzed the plain language of the CDA. Rather, the court in Lehman gave substantial weight to Admiral Rickover's testimony at hearings leading to passage of the Act urging that Congress impose a certification requirement on claims in order to discourage the submission of unsubstantiated claims.[20] While the court accurately quoted the Admiral's testimony,[21] there is nothing in his testimony which even remotely suggests that certification, prior to a contracting officer's decision, should be a jurisdictional predicate to direct judicial review of a final decision of a contracting officer. The court in Lehman also relied on decisions of the Armed Services Board of Contract Appeals.[22] Again, there is nothing in these decisions that suggests that either the board or the court is without jurisdiction to hear appeals from decisions of the contracting officer on uncertified claims.[23]

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[19] 685 F.2d at 419. In Fidelity and Deposit Co. of Maryland v. United States, 2 Cl. Ct. 137 (1983), the Claims Court extended the rationale of Lehman et al. to multiple claims arising out of the same fact situation holding that where such claims constitute a "unitary" claim it is the amount of the "unitary" claim and not the amount of each individual claim which determines whether the certification requirements of the CDA must be followed. See also Warchol Construction Co. v. United States, 2 Cl. Ct. 384 (1983); Black Star Security, Inc. v. United States, 5 Cl. Ct. 110 (1984).

[20] 673 F.2d at 355.

[21] See supra notes 10-12 and accompanying text.

[22] 673 F.2d at 355.

Most significantly, the court in Lehman relied on the definition of a claim contained in the Defense Acquisition Regulation (DAR) § 1-314(b)(1). This regulation is the only direct support for the holding in Lehman. The DAR provided that a demand by a contractor for payment of money in excess of $50,000 "is not a claim unless or until certified."[24] However, the regulations controlling the contract at issue in Lehman were not the DAR but the Federal Procurement Regulations (FPR) and the FPR at that time adopted the Office of Federal Procurement Policy Letter 80-3 to agencies on the Contract Disputes Act.[25] This policy letter defined a claim as a "written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief."[26] Certification is treated not as part of the claim, but as an additional item that should be submitted with the claim.

The Court of Appeals for the Federal Circuit carried its decisions on certification to their logical conclusion in W.M. Schlosser Co. v. United States.[27] In this case, the court vacated a decision by the board of contract appeals rendered on a claim which was not certified by the contractor at the time the contracting officer rendered his final decision on the claim. The claim was certified before the board of contract appeals rendered its final decision on the claim. No change was made in the claim at the time it was certified. The court held that because the claim was not certified when it was submitted to the contracting officer, the board should have neither heard nor ruled on the appeal.

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[23] The board in the two cited cases did refuse to consider uncertified claims but did not conclude that it did so because it lacked jurisdiction to hear the claims. In Newell Clothing Co., ASBCA No. 24482, 80-2 BCA ¶ 14,774 (1980), there was no final decision of a contracting officer. Furthermore, the board in Newell did not decide the applicability of certification to disputes which do not involve monetary claims. In Harnischfeger Corp., ASBCA Nos. 23918, 24733, 80-2 BCA ¶ 14,541 (1980), the issue was the form of the certification.

[24] DAR § 1-314(b)(1) cited in 673 F.2d at 355. The contract at issue was not a Defense Department contract but rather a Department of Agriculture contract. 673 F.2d at 354. A similar definition of a claim has been incorporated in the new Federal Acquisition Regulation (FAR), 48 C.F.R. § 33.001. The FAR replaces the DAR and the Federal Procurement Regulations System.

[25] 49 Fed. Reg. 31,035 (May 9, 1980).

[26] Id.

In United States v. Hamilton Enterprises, Inc.,[28] the court finally did provide some limited relief from the rigid strictures of the Lehman line of cases. In the Hamilton Enterprises case, the contractor submitted an uncertified claim to the contracting officer involving a default termination. This claim was denied and an appeal was taken to the Armed Services Board of Contract Appeals. While the matter was pending before the Board, the contractor filed a supplemental complaint seeking reformation. The contractor had originally asked the contracting officer to find that the contract should not have been terminated for default.

The claim for reformation was certified in accordance with the requirements of the CDA. By stipulation the parties agreed that the contractor was merely seeking an alternative remedy based on the same operative facts that formed the basis for the contracting officer's original decision. They further stipulated that if the contracting officer were to be asked for a final decision, the contracting officer would deny the reformation claim on the same basis as his original decision. The parties further stipulated that the original decision constituted a de facto final decision on the reformation claim.

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[27] 705 F.2d 1336 (Fed. Cir. 1983). In Fidelity Construction Co. v. United States, 700 F.2d 1379 (Fed. Cir. 1983), the court held that a contractor cannot recover the interest which is authorized to be paid on a claim submitted under the CDA pursuant to section 12 of the Act, 41 U.S.C. § 611, unless and until the claim, if it exceeds $50,000, has been properly certified.

[28] 711 F.2d 1038 (Fed. Cir. 1983).

The government argued that the court could not exercise jurisdiction over the reformation claim because the claim was never submitted as a formal certified claim to the contracting officer for a final decision. The court disagreed indicating that "[t]his position of the Government collides head-on with the facts set forth in the stipulation. There is no doubt that the reformation claim was certified in the language of the statute and sworn to as required." The reformation claim was considered by the contracting officer and the court stated "for all practical purposes it was denied."

The court felt that the facts in the case were essentially similar to the situation where the contractor asserts a new claim after an appeal to the board and obtains a contracting officer decision on that claim before the board proceeds to exercise jurisdiction under the CDA. The court held that the stipulations amounted to "substantial compliance with the certification requirements with the CDA" and therefore the board had jurisdiction to consider the merits of the claim for reaffirmation.[29]

Some limited relief from a rigid application of the certification requirements has also been provided by the Federal Circuit's decision in Tecom, Inc. v. United States.[30] In this case, the court held that a board of contract appeals had jurisdiction to consider an uncertified claim for more than $50,000 where the amount properly asked at the time of the contracting officer's final decision was less than $50,000. The increase in the amount of the claim to bring it above $50,000 occurred after the contracting officer's decision. It resulted in part from the decision of the government to exercise an option in the contract and extend the performance period for the contract from one year to three years. The court in Tecom cited with approval the decision of the Claims Court in J.F. Shea Co. v. United States,[31] in which the Claims Court upheld the right of a contractor to increase the monetary amount of a claim without further certification on the basis of new information on damages. The court in reaching its holding concluded that the claims considered in Tecom and J.F. Shea Company were the

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[29] 711 F.2d at 1043.

[30] ____ F.2d ____, 2 FPD ¶ 162 (Fed. Cir. April 24, 1984).

[31] 4 Cl. Ct. 46 (1983).

"very same claims[s] (but in an increased amount reasonably based on further information)" that were "properly" considered by the contracting officer.[32]

IV. DECISIONS BY BOARDS OF CONTRACT APPEALS ON UNCERTIFIED CLAIMS

A. Introduction

In a series of decisions prior to and following Lehman, the boards of contract appeals have considered their jurisdiction under the CDA to decide uncertified claims. Prior to Lehman the boards were somewhat equivocal as to their jurisdiction to consider uncertified claims.[33] With the decision in Lehman, the boards took a seemingly more forthright position. The 1982 decision in the John R. Hundley case is typical. There the Armed Services Board of Contract Appeals (ASBCA) held:

> In accordance with Section 6(c)(2) of the Act, we have long recognized that certification is a prerequisite to obtaining a contracting officer's decision on a contractor claim of more than $50,000. Newell Clothing Co., ASBCA No. 24482, 80-2 BCA ¶14,774; Allied Materials & Equipment Co., ASBCA No. 24373, 80-1 BCA ¶14,340. The prerequisite of 'a properly certified claim over $50,000' is similarly reflected in Rule 1(c). Therefore, under our Rules and decisions, and under the express language of Section 6(c)(2) of the Act, a contractor who fails to certify a claim for monetary adjustment over $50,000 is entitled to neither a decision on its claim by the contracting officer nor to notification of when a decision will be issued.[34]

As will be seen from the discussion below, it is far from clear that the position of the ASBCA is far from unequivocable. While certification is now a generally recognized requirement for its consideration of claims over $50,000, the ASBCA has from its first decisions under the CDA qualified and carved out exceptions to its interpretation of the certification requirement of the CDA.

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[32] 2 FPD ¶ 162 at 6.

[33] See cases discussed supra note 23.

[34] ASBCA No. 26689, 82-1 BCA ¶ 15,691 at 77,616 (1982).

In Trinity Services, Inc.,[35] one of the first cases to deal with the certification requirements of the CDA, the claim at issue was filed before the effective date of the CDA. The contracting officer's decision on the claim came after the CDA became effective. Because the claim was in the amount of $55,018 and was not certified, the government moved to dismiss for lack of jurisdiction under the CDA. The ASBCA, while conceding that certification was a requirement for claims over $50,000, refused to dismiss the appeal. The board based its decision on the fact that the claim was submitted before the effective date of the CDA, at a time when certification was not required.[36] The board ruled that since the contractor had elected to proceed under the CDA, the government could request a suspension of proceedings for the purpose of certification.[37] The Court of Claims in Folk Construction Co. v. United States[38] recognized a similar exception to the certification requirement.

In Harnischfeger Corporation,[39] one of the first decisions of the ASBCA involving an uncertified claim that was filed after the effective date of the CDA, the ASBCA again found that it has some flexibility to apply the CDA certification requirements. In this case the contractor submitted a claim for $17,528,073. The claim included the elements of certification required by section 605(c)(1) of the CDA except that the amount requested "was qualified by the phrase 'as amended according to proof at the time of trial.'"[40] The board found that on the basis of this limitation, the contractor had not made the type of unqualified certification of a "sum certain" required by the CDA.[41]

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[35] 79-2 BCA ¶ 14,090.

[36] 79-2 BCA at 69,302.

[37] Id. The government at the time Trinity Services was decided apparently did not consider certification to be a jurisdictional prerequisite to CDA consideration by a contracting officer of claims over $50,000. In Trinity, the government argued that the ASBCA should dismiss the contractor's appeal on the grounds, inter alia, that the contractor failed to appeal the contractor's decision on the uncertified claim within the time limits for appeal set by the CDA.

[38] No. 99-80C (Ct. Cl. order entered January 16, 1981).

[39] ASBCA Nos. 23918, 24733, 80-2 BCA ¶14,541 (1980).

The claim was certified in this manner because the contractor was concerned that by certifying to a "sum certain" before the contracting officer's final decision it would be precluded from proving a higher amount at an ASBCA hearing. The contractor also worried that under the CDA it would be liable for making a fraudulent statement if it were unable to establish at hearing the full amount of the claim as certified. The board stated that certification as to one sum "does not preclude proof of a higher amount at a hearing."[42] The board also stated that if a claim is initially made in good faith and to the best of the contractor's knowledge and belief at that time, it would not constitute fraud to prove less than the full amount at the hearing.[43]

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[40] Id. at 71,676-77.

[41] Id. at 71,679.

[42] Id. at 71,679. Initially it appeared that this holding was cast in doubt by the Court of Claims subsequent decision in W.H. Mosely Co. v. United States, 677 F.2d 850 (Ct. Cl. 1982) where the court stated that "to properly certify a claim a contractor must make a statement which simultaneously makes all of the assertions required by 41 U.S.C. § 605(c)(1)." 677 F.2d at 852. For example, if an initial claim for $100,000 were amended to increase the claimed amount to $250,000, the amendment would not occur "simultaneously" with the other elements of the original certifications. However, Tecom, Inc. v. United States, supra note 30, has laid that concern to rest.

In Newell Clothing Co.,[44] the ASBCA again took up the question of certification in a complex case involving a contractor's appeal from a contracting officer's failure to issue a decision on the government's ultimate liability, i.e. the contractor's entitlement to recover on his claim. The issue of quantum or amount of claim was not before the contracting officer. The government asserted that the contracting officer did not decide the claim because the contractor had not filed the certification required by the CDA and moved to dismiss the appeal. The board concluded that under the CDA, since the ultimate amount of the claim was more than $50,000, the contracting officer could demand a full certification as to both entitlement and quantum.[45] Significantly, however, the board concluded that the contracting officer could also in his or her own discretion determine "that, pending a board or court decision on entitlement, it is not in the government's interest to dispute quantum"[46] and therefore the contracting officer may "accept a certification of the data in support of entitlement only."[47] In effect, the board allowed the contracting officer to defer his decision on quantum until after the board decides entitlement.[48]

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[43] Harnischfeger Corporation, supra note 39, at 71,679.

[44] ASBCA No. 24482, 80-2 BCA ¶ 14,774 (1980).

[45] Id. at 72,920. Where a claim under a Department of Defense contract exceeds $100,000, certification of the claim also is required under Section 813 of the Department of Defense Appropriation Authorization Act of 1979, Pub. L. No. 95-485, 92 Stat. 1611, 1624-25 (1978). This requirement is discussed extensively in the majority and dissenting opinions in Newell Clothing where the board stated that while Section 813 was not a jurisdictional statute, no funds could be used to pay a claim that is not certified and complete certification as to entitlement and quantum is needed. Without such a certification, an appeal would be "valueless." 80-2 BCA, at 72,919-20.

[46] 80-2 BCA at 72,919.

[47] Id. at 72,920.

The board, as in the Harnischfeger case, left open the door for submission to the board of a claim in an amount in excess of the amount originally certified, stating:

> Even after a certification has been submitted, a contractor is not precluded from changing the amount of the claim or producing additional data. The only requirements are that the contractor certify to the amount he then honestly believes is due and that the data furnished at the time are accurate and complete to the best of his knowledge and belief.[49]

The Agricultural Board of Contract Appeals (AGBCA) has also recognized the inequities that can result from unreasonable application of certification requirements. In Summit Contractors,[50] the AGBCA, citing with approval the decisions of the ASBCA in Newell and Harnischfeger, held that certification is not required whenever the contractor is claiming relief under a remedy clause which provides for no monetary relief. In this case, a clause in the contract permitted the government to extend the contract term where the contractor encountered excusable delays.

The board allowed the contractor to seek a decision on an uncertified claim because it recognized that while such relief has a monetary value, it would be extremely difficult for the contractor to express his claim in terms of money. This is because the board stated

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[48] The board dismissed the Newell appeal without prejudice giving the contracting officer "the opportunity to determine whether he wished to dispute quantum as well as entitlement pending a decision by this Board." 80-2 BCA at 72,916. The board did not decide the applicability of certification to disputes which do not involve monetary claims. Id. at 72,920.

[49] 80-2 BCA at 72,916.

[50] AGBCA No. 81-136-1, 81-1 BCA ¶ 14,872 (1980).

"any additional time granted is simply a right to harvest and remove timber at a purchase price which would have applied but for the excusable delay and the end result in money is unknown."[51] The board thus recognized that where an issue of excusable delay is presented, the contractor will not be able in many instances to know what monetary damages are suffered until performance under the time extension has been completed and certification should not be required. This rationale could easily be extended to a host of similar claims arising under the standard Changes Clause of government contracts.[52]

In B.D. Click Co.,[53] the ASBCA opened the door to further consideration of uncertified claims by creating a new doctrine -- abuse of certification requirements. In B.D. Click, the contractor filed 12 separate claims over a six-months period. None of the individual claims exceeded $50,000. However, the government advised the contractor that the 12 separate claims would be treated as one claim for over $149,000, and that a certification was required for the combined claim. The contractor refused to file the requested certification and after the contracting officer did not act on any of the 12 claims, he filed an appeal on December 4, 1980, approximately one year after the first claim had been filed.

The ASBCA reviewed each of the individual claims and found that each met the definition of a claim in the DAR regulations concluding that:

> Each item is an independent dispute concerning contractual rights and is not intertwined in the merits of any of the other requests for equitable adjustment. Therefore, each of the

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[51] Id., at 73,438.

[52] See Newell Clothing Co., supra note 44, at 72,923 (dissenting opinion). The CDA is not limited to the resolution of monetary claims. See 41 U.S.C. § 605(a) quoted supra page 5.

[53] ASBCA No. 25609, 81-2 BCA ¶ 15,394 (1981).

> instant claims must exceed $50,000 before certification is required for that claim.[54]

The board concluded that the certification requirements were "abused" because the government had allowed individual claims to accummulate without a contracting officer's final decision until the aggregated claim exceed $50,000 and then demanded a certification.[55] The board noted that despite repeated requests for a contracting officer's decision, no decision was ever made and that the total claims might not have reached such a high figure if they had been acted on in an expeditious manner.[56]

The government also asserted that the contractor had not quantified a number of the claims before filing the appeal and that the contracting officer was, therefore, unable to determine which, if any, required certification and which, if any, therefore, he was to act on. In very broad language, which opened the board to consideration of uncertified claims for more than $50,000, the board in light of its earlier finding of abuse stated that:

> The simple fact is, however, that, prior to the docketing of this appeal, appellant was not advised by the contracting officer that its claims should be quantified and that its requests for final decisions were therefore premature. Certainly, the contracting officer should have at least notified the appellant that he could not act upon the claims without additional information. We will therefore not permit the Government to use appellant's earlier lack of quantification to excuse the absence of a contracting officer's final decision in an effort to deny appellant

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[54] Id. at 76,264.

[55] Id.

[56] Id.

> access to the Board.[57] [Emphasis supplied.]

The ASBCA in B.D. Click appeared to create yet another exception to the certification requirement holding that:

> If appellant is unable to estimate the quantum of any claim it shall explain to the Board the nature of the difficulty and shall state to the Board that the quantum claim is less than $50,000.[58]

In Allied Repair Service, Inc.,[59] the ASBCA relied on its decision in B.D. Click to reject the government's contention that the contractor was required to combine two separate identifiable claims of less than $50,000 into a single claim, which in this case would have amounted to more than $50,000, and to provide a certification to the combined claim before taking an appeal to the board.

The board observed that each of the separate claims were properly submitted to the contracting officer. However, the government asserted that all claims, which raised the issue of whether the contractor should do more work under the contract, should be joined as a single claim. The board rejected this argument stating that the argument if "carried to its logical conclusion" would require mandatory joinder "for all constructive change claims under the same contract."[60] The board concluded that "[t]he only requirement affecting the timing of such claims is that they be 'asserted' within the time limit prescribed by the Changes clause."[61]

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[57] Id.

[58] Id. at 76,265. The board did limit this exception by also holding that:

> If appellant is unable to state that any of the claims are for less than $50,000, appellant shall provide the proper certification for that claim or face dismissal of that claim.

81-2 BCA at 76,265.

[59] ASBCA No. 26619, 82-1 BCA ¶ 15,785 (1982).

In Computer Sciences Corporation,[62] the ASBCA extended the Newell holding to provide relief when a contractor could not know the full value of a claim at the time the claim was filed. The ASBCA had before it a contracting officer's decision on a certified claim of $1,406,630.00. The claim included $520,521.00 in anticipated future cost based on identified government changes. The $520,521.00 portion was forward priced and was based on predictions by Computer Sciences Corporation based on certain assumptions with respect to an expected course of government with respect to this contract. Relying on Newell the ASBCA found that consideration of the entire claim was proper under the CDA. The board stated that it was not an "improper qualification of the claim for appellant to notify the Government therein of a potential upward adjustment of the claimed amount. It is sufficient for compliance with the CDA that appellant certified to all existing data supporting its claim."[63]

In Brinegan and Fuller, Inc.[64] the ASBCA held that an amended claim requires a new certification only when it contains one or more bases for recovery which were not included in the original claim. An amended claim, however, does not require certification even where there is a substantial increase in the amount of the claim where the amendment was attributable in large part to information concerning actual cost which was not available when the claim was originally certified and decided by the contract officer.

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[60] Id. at 78,164. If the multiple claims arose out of the same set of facts and therefore amounted to a "unitary" claim, joinder of the multiple claims for certification purposes would be required under Fidelity and Deposit Co. of Maryland v. United States and the other cases cited supra note 19.

[61] Allied Repair Service, 82-1 BCA at 78,164. This is 30 days for actual changes, and a reasonable time for constructive change but in any event no later than the date of final payment.

[62] ASBCA No. 27275, 83-1 BCA ¶ 16,452 (1983).

[63] Id. at 81,843.

[64] ASBCA No 28427, 83-2 BCA ¶ 16,802 (1983).

B. Summary

While the general rule is that claims over $50,000 must be certified, the boards have made numerous exceptions to the certification requirement of the CDA. These include:

(1) claims filed before the effective date of the CDA;[64]

(2) amounts claimed above the initial amount certified to the contracting officer;[65]

(3) quantum of claims over $50,000 at the discretion of the contracting officer;[66]

(4) claims where the contractor is unable to estimate quantum;[67]

(5) claims where the government has abused the certification process;[68] and

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[64] Trinity Services, Inc., supra note 35; Folk Construction Co. v. United States, supra note 38.

[65] Harnischfeger Corporation, supra note 39; Newell Clothing Co., supra note 44.

[66] Newell Clothing Co., supra note 44.

[67] Summit Contractors, supra note 50; B.D. Click Co., supra note 53.

[68] B.D. Click Co., supra note 53; Allied Repair Service, Inc., supra note 59.

(6) claims based on estimates of anticipated costs.[69]

V. IMPLICATIONS OF THE CERTIFICATION DECISIONS

By establishing certification as a jurisdictional prerequisite to the consideration of claims under the CDA, the boards and the courts have created a series of artificial and complex barriers to the resolution of claims under government contracts. It is exactly the opposite of what Congress had in mind in creating the CDA.[70]

The complexity is particularly shown by the decisions of the BCA in the B.D. Click and the Allied Repair Service cases. As a result of these two decisions, contracting officers must act in a reasonable time on each separate claim submitted by a contractor. These claims can be quite numerous in major systems development and construction contracts and the resolution of these claims could lead ultimately to increases in appeals since each contracting officer's decision on each claim is appealable to a board of contract appeals.[71]

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[69] Computer Sciences Corporation, supra note 62.

[70] In Newell Clothing, for example, the dissenting judges observed that a requirement for a contractor to compile data in support of quantum was inconsistent with the general purposes of the CDA. They stated that:

> [T]he Act seeks to induce the resolution of disputes by negotiation, and an efficient and inexpensive resolution by agency boards where settlement by agreement is not possible.

Newell Clothing, supra note 44, at 72,922 (dissenting opinion).

[71] The decision in Newell Clothing, under which a contracting officer can demand certification as to quantum and entitlement for claims over $50,000, will lead to further delays in resolving disputes before the boards of contract appeals and could lead to even further delay. See Newell Clothing, supra note 44, at 72,923 (dissenting opinion).

This is even more likely because the certification requirement of the CDA has been coupled with the provision of the CDA which allows contractors to recover interest on claims and now contractors can recover interest on claims over $50,000 only where they are certified.[72] Accordingly, contractors, who want to assure that they recover interest on their claims can be expected to submit each claim to the contracting officer as soon as they become known to contractors.

On first reading, it might appear that the implications of Lehman, Moseley, and Skelly & Loy are limited. The cases would appear to be an unfortunate by-product of the shake-out process that is inevitable when any new remedy-creating legislation is passed by Congress. Now that contractors know that certification is required before a contracting officer's decision, and now that the contracting officers know that certification is required before the issuance of a final decision, it might appear that the cases will have a very limited application in the future. A closer reading of the decisions could lead to another conclusion.

There are numerous claims involving substantial amounts of money where it is virtually impossible for a contractor to certify that the amount of money requested accurately reflects the government's liability until the passage of months or even years after the claim initially arises. However, under notice requirements imposed on government contractors by the FAR changes clause the contractor has an obligation to notify the government of claims and request an equitable adjustment of the contract terms within 30 days after the contractor learns of the change.[73] In contracts for construction and major systems acquisitions, for example, the contractor cannot possibly determine with any certainty the amount of money involved in the equitable adjustment.[74] Prior to the enactment of the CDA, it was common practice for the contracting officer to first determine the contractor's entitlement under the claim and to then resolve the quantum of that entitlement. That option would appear to be precluded now.[75]

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[72] See, for example, Fidelity Construction Company v. United States, supra note 6; Luedtke Engineering Co., ENG BCA No. 4556, 82-2 BCA ¶ 15,851 (1982); Federal Electric Co., ASBCA No. 24002, 82-2 BCA ¶ 15,862 (1982).

[73] 48 C.F.R. § 52.243-4.

While the contractor would be able to certify that the amount claimed in an equitable adjustment is over $50,000, the literalness with which the Court of Claims has interpreted a certification requirements is almost certain to result in the contractor being required to wait until it knows the full amount of the claim before seeking recovery.[76]

VII. CONCLUSION

Contractors taking direct appeals to the new Claims Court from decisions of contracting officers or claims that do not fit the rigid procrustean bed created by the courts face almost certain dismissal and subsequent rejection of their claims. With the W.M. Schlosser Company decision, they now face similar problems before the boards of contract appeals.

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[74] This is recognized by the FAR in the "Notification of Change" clause for major systems acquisition contracts. 48 C.F.R. § 52.243-7.

[75] See for example Newell Clothing, supra note 44, at 72,926 (dissenting opinion).

[76] While the Computer Sciences Corporation, supra note 62, decision clearly provides some relief by allowing a contractor to certify a claim which includes an estimate of future costs, it is not certain that the Court of Appeals for the Federal Circuit is willing to adopt this approach. In Tecom, Inc., supra note 30, the Federal Circuit, while allowing proof of a claim in an amount exceeding that which was before the contracting officer, noted that in the case before it "[t]here is no violation of either the letter or the purpose of the Contract Disputes Act, i.e., to push contractors into being careful and reasonably precise in the submission of claims to the contracting officer." Id. at 5.

The practical effect of the decided cases has been to require the contractors to relitigate their claims through the entire adjudication process beginning with a request for a "new" final decision of the contracting officer through trial before a board of contract appeals and the courts. This result is required notwithstanding the fact that such litigation is costly and time-consuming and will in all likelihood not lead to any change in the final decision at issue.

Unless and until the CDA is amended by Congress,[77] contractors seeking resolution of claims for sums-uncertain have cause to be concerned. Such contractors would be well advised to carefully structure

their claims to give as much certainty as possible to the amount claimed and, if they need timely resolution of these claims, to make every effort using the Computer Sciences precedent to initially claim in "good faith" the full amount to which they are likely to be entitled.

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[77] Legislation to eliminate the certification requirement of the Contract Disputes Act has been introduced by Representative Thomas Kindness, H.R. 3668, and by Senator Grassley, S. 2093. Representative Kindness' bill is awaiting action on the floor of the House. There has been no action on Senator Grassley's bill.

Appendix 1 - Contract Disputes Act
Appendix 2 - Letter from Leonard J. Suchanek, Chairman, Board of Contract Appeals, General Services Administration, to John S. Pachter, dated March 4, 1983, Subject: Contract Disputes Act of 1978 - Proposed Amendments to the Certification Provisions

BACKGROUND REPORT FOR RECOMMENDATION 83-2
(as published in Adm. L. Rev. , Spring 1984, Vol. 36, No. 2)

THE ADMINISTRATIVE PROCEDURE ACT'S "GOOD CAUSE" EXEMPTION

Ellen R. Jordan*

I. INTRODUCTION

Advances in medical technology have made it possible to prolong lives which otherwise would have ended. When the life in question is that of a severely handicapped newborn, agonizing life-or-death decisions must be made and made quickly. The moral and ethical dilemmas reached public consciousness in 1982. In Bloomington, Indiana, a child identified only as "Baby Doe" was born with Down's syndrome (mongolism) and a surgically correctable blockage of his digestive tract. His parents refused to consent to corrective surgery, and despite appeals by the county prosecutor to the state courts, no judicial intervention occurred. The infant died six days later.[1]

The "Baby Doe" case attracted national attention and prompted the federal government to take action under federal law prohibiting discrimination on the basis of handicap in administering federally assisted programs.[2] A newly appointed Secretary of Health and Human Services determined to set up and publicize a nationwide reporting system to receive and coordinate complaints of discrimination against handicapped infants. Recipients of federal health care dollars were directed to post a notice encouraging reporting, to a tollfree number in the department, by anyone with knowledge that a handicapped infant was being denied food or care.[3] Upon receipt of such reports, HHS intended to "rely heavily on . . . state and local agencies, . . . which have traditionally played the key role in the investigation of complaints of child abuse and neglect."[4] Because young lives were arguably at risk, the interim final rule was issued without following the usual procedures for agency rulemaking under the "good cause" exemption[5] in the Administrative Procedure Act (APA).[6] Within days, groups representing pediatricians and hospitals filed suit challenging the rule as an arbitrary, capricious, heavy-handed intrusion into the most delicate medical judgments. In addition, the plaintiffs challenged the promulgation of the rule without allowing comment by those most immediately affected,[7] arguing that the rule was procedurally defective as well.

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[1] N.Y. Times, Apr. 15, 1982, at 21, col. 5; N.Y. Times, Apr. 16, 1982, at 14, col. 6.

[2] On April 30, 1982, the President issued a directive and on May 18, 1982, the Health and Human Services Office for Civil Rights issued a "Notice to Health Care Providers." Both documents reminded recipients of federal financial assistance of the applicability of section 504 of the Rehabilitation Act of 1973. That section provides: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (Supp. V 1981).

A better case could hardly be imagined to illustrate the tension between the values at stake in "good cause" cases. In general, when the agencies of the federal government make rules,[8] the APA provides for public participation in their formulation.[9] These procedures further

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[3] *See* Interim Final Rule, 48 Fed. Reg. 9630 (1983).

[4] *Id.*

[5] 5 U.S.C. § 553(b)(B)(1982)

[6] 5 U.S.C. §§ 551–559 (1982).

[7] The secretary made an explicit finding that "[a]ll modifications made by the interim final rule are necessary to protect life from imminent harm. Any delay would leave lives at risk." 48 Fed. Reg. 9631(1983). Thus, invoking the "good cause" exemption, the rule was issued without prior notice and comment, although comments were solicited on the rule as published. *Id.*

[8] The APA defines a "rule" as follows:

> Rule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. § 551(4) (1982).

[9] Rulemaking procedures are set out in 5 U.S.C. § 553, which states:

> (a) This section applies, according to the provisions thereof, except to the extent that there is involved—
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> (1) a military or foreign affairs function of the United States; or
>
> (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
>
> (b) General notice of proposed rule making shall be published in the Federal Register,

the important goals of accurate, well-informed decisionmaking and participant satisfaction with the way government operates.[10] But public participation can also be costly; the time necessary to solicit and evaluate public comments may foreclose government's ability to react swiftly. Furthermore, when agency rule changes are minor, technical, and uncontroversial, it would be wasteful to go through the motions of full notice and comment. As pragmatists, acutely aware that government must be permitted to function, the APA draftsmen included an exemption from the usual requirement of the notice-and-comment procedure if there is "good cause" to bypass it.[11]

As in the *Baby Doe* case, this issue has become a battleground, implicating deeply-held values. It is not surprising that those affected by often far-reaching decisions demand some opportunity to present their views, especially when they strongly oppose the agency's rule; a society which rests on participation and governmental accountability

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unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this section does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, section[s] 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

[10] Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279 (1978).

[11] 5 U.S.C. §§ 553(b)(B) and (d)(3) (1982).

promises no less. Nevertheless, as problems arise which call for swift action, the delays and costs associated with gathering input loom large. Agencies invoking the exemption have been challenged, and the courts have struggled to accommodate the conflicting values as they scrutinize claims of "good cause."[12] Furthermore, regulatory reform bills under consideration by Congress[13] would make some changes in the wording and the practice of the exemption. It is the aim of this study to catalogue the "good cause" decisions and suggest some changes which would better accommodate the competing values at stake. Although experience has shown that "good cause" situations are so varied as to defy attempts to categorize them in advance, history has also demonstrated the dangers of proceeding without public input. Agencies should provide for advance comment whenever possible, and should use "good cause" procedures only to frame narrow solutions to the most pressing regulatory problems. In such situations, the agency should solicit public reaction after promulgation to achieve the best rule possible.

II. PUBLIC PARTICIPATION IN RULEMAKING AND THE "GOOD CAUSE" EXEMPTION

Public participation in the rulemaking of federal agencies is important both to the agencies and to the public. The opportunity to comment on matters of direct concern encourages and stimulates those in possession of information and ideas relevant to the regulatory task to come forward and help educate the agency. The prospect of binding rules which will affect and limit private behavior is a powerful incentive to speak up, thus providing government with valuable data at relatively low cost. Thus, mandating an opportunity for the interested public to offer input is often an effective and efficient way for government to gather the information necessary to make sensible decisions.

Public participation is also important to those affected by regulation. The opportunity to comment represents a crucial chance to dissuade regulators from actions which individuals or groups consider unwise or ill-founded. Furthermore, notions of fundamental fairness suggest some opportunity for affected persons to provide input into decisions which may have far-reaching effects on them. Agencies which listen and respond to public comment enhance their legitimacy and accountability, both of critical importance when decisionmaking is delegated to a nonrepresentative, politically insulated body. Thus, distinguished commentators[14] affirm the principle of soliciting public comment in the rulemaking process, as the APA does in section 553.

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[12] For an earlier compilation, *see* Annot., 45 A.L.R. FED. 12, 74–97 (1979).

[13] S. 1080, 97th Cong., 2d Sess., 128 CONG. REC. S2713 (daily ed. Mar. 24, 1982).

As provided by the APA, an agency which plans to issue a rule must publish in the Federal Register a notice which includes either the actual provisions of the proposed rule, or a summary statement of the subject or issues to which they relate.[15] If the rule is of limited applicability, so that the agency can identify and provide actual notice to all persons subject to the rule, no publication is required.[16]

After giving notice, the agency is required to accord interested persons an opportunity to comment "through submission of written data, views, or arguments with or without opportunity for oral presentation."[17] The APA requirements represent a minimum; agencies often provide more extensive public procedures to ventilate especially controversial issues,[18] and Congress has mandated a variety of procedural forms in statutes passed since the APA.[19]

The agency is required to review comments received, and to prepare for any rule issued a statement of its basis and purpose.[20] Although there is no formal requirement that the agency address the comments received, failure to consider significant issues raised by such input may call into question the rationality of the final rule and result in judicial nullification on review.[21]

Despite the advantages of soliciting input, the process itself can be costly, especially when prompt action is crucial. In some instances, the rule is merely technical and predictably uncontroversial. In others, the agency is lifting a restriction and foresees no conceivable objection. In such instances, permitting the public an opportunity to comment would serve no useful purpose, and would introduce unnecessary delay into the process of government.

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[14] *See* especially the work of Professor Arthur Bonfield, *e.g.*, Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. Pa. L. Rev. 540 (1970); Bonfield, *Military and Foreign Affairs Function Rulemaking Under the APA*, 71 Mich. L. Rev. 221 (1972); *see also* 1 K. Davis, Administrative Law Treatise 593–94 (2d ed. 1978).

[15] 5 U.S.C. § 553(b)(1982).

[16] *Id.*

[17] 5 U.S.C. § 553(c)(1982).

[18] For instance, in the celebrated *Vermont Yankee* litigation, the Atomic Energy Commission afforded opportunity for oral argument before an AEC hearing panel. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

[19] *See* Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovations in Administrative Rulemaking*, 60 Calif. L. Rev. 1276, 1313 (1972).

[20] 5 U.S.C. § 553(c)(1982).

[21] *See, e.g.*, National Tire Dealers & Retreaders Ass'n v. Brinegar, 491 F.2d 31 (D.C. Cir. 1974).

Moreover, some situations may call for prompt action in response to fast-moving events. The delay added by soliciting public comment may hinder an effective response, and in some cases, advance notice of proposed action may actually exacerbate the problem facing the agency. Especially when governmental agencies have been assigned the task of regulating volatile sectors, such as gasoline or financial markets, advance notice of regulatory measures would produce adjustments that would nullify the effect of the measures and perhaps worsen the problem.

Hence, in some situations public participation may be too costly or too destructive of the important values of efficiency and effectiveness. The APA takes two approaches to reconciling the advantages of public participation with the need to allow government to function: section 553 provides for categorical exemptions from the requirements of notice-and-comment procedures,[22] and also includes a discretionary exemption for situations where the agency finds "good cause" to issue rules without advance public participation.[23]

The APA's "good cause" exemption is qualified and limited; the agency must find that notice and public procedure are "impracticable, unnecessary, or contrary to the public interest."[24] Both the finding and a brief statement of reasons therefor must be incorporated into the rule issued.

The grounds listed in section 553(b)(B) are stated in the alternative, so that any one of them is sufficient to invoke the exemption, although in practice the terms tend to overlap. The legislative history of the APA provides a gloss on all three terms. "Impracticable" referred to a situation in which "the due and required execution of agency functions would be unavoidably prevented by its undertaking public rulemaking proceedings."[25] Thus, impracticability seems to focus on the need for quick action. "Unnecessary" was interpreted to refer to cases involving

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[22] Some exemptions are quite broad: section 553(a) exempts from all rulemaking requirements "military or foreign affairs function[s]" and "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits or contracts." Others are narrower: section 553(b)(A) exempts "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice," from the notice-and-comment procedures.

[23] 5 U.S.C. § 553(b)(B)(1982).

[24] *Id.*

[25] S. Doc. No. 248, 79th Cong., 2d Sess. at 200, 258 (1946) [hereinafter cited as S. Doc. No. 248]. This document is the official legislative history of the APA and contains working papers and committee reports.

"a minor or merely technical amendment in which the public is not particularly interested."[26] The phrase "contrary to the public interest" was identified as one which "supplements the terms 'impracticable' or 'unnecessary'; it requires that public rulemaking procedures shall not prevent an agency from operating and that on the other hand, lack of public interest in rulemaking warrants an agency to dispense with public procedure."[27] The Attorney General's Manual on the Administrative Procedure Act, issued contemporaneously by a group which had taken a leadership role in drafting the APA,[28] suggests another, independent significance for the term "contrary to the public interest:" the term refers to situations "in which the interest of the public would be defeated by any requirement of advance notice."[29] Thus, even if there is no particular need for speed in developing policy, the policy initiative depends on an element of surprise in order to have any effect.

Section 553 contains a second "good cause" exemption, which requires that a rule shall be published in the *Federal Register* at least 30 days before it takes effect.[30] The delayed effective date serves two functions: it permits the public to prepare for the new rule[31] and also provides an opportunity to correct error or oversight in the final regulations before they become effective.[32] This section includes its own "good cause" exemption,[33] allowing agencies to give immediate or even retroactive effect to regulations if there is the required "good cause" to do so.

Noteworthy in the legislative history of the APA is a recurrent admonition that any "good cause" exemption should be a narrow one. The agencies were not to have an "escape clause" from the requirements Congress prescribed. "A true and supported or supportable finding of necessity or emergency must be made and published."[34]

In summary, although Congress recognized that it might at times be appropriate to dispense with these procedural protections, it spoke unmistakably clearly on the narrowness of the exemptions, thus indicating the importance ascribed to the section 553 procedures.

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[26] *Id.*

[27] *Id.*

[28] The Attorney General's Committee on Administrative Procedure issued an influential report after an exhaustive study of existing federal procedure. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941). Many of its recommendations were incorporated into the Administrative Procedure Act.

[29] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31 (1947) [hereinafter cited as ATTORNEY GENERAL'S MANUAL].

[30] 5 U.S.C. § 553(d)(1982).

[31] S. DOC. No. 248 at 259.

[32] ATTORNEY GENERAL'S FINAL REPORT, *supra*, note 28 at 114.

[33] 5 U.S.C. § 553(d)(3)(1982).

[34] S. DOC. No. 248 at 200, 258.

III. JUDICIAL CONSTRUCTION OF THE GOOD CAUSE EXEMPTIONS

Decisions interpreting the good cause provisions of section 553 necessarily have an ad hoc quality. Since the statutory procedure applies to all federal agencies which issue rules, agencies which face different problems and have widely diverse responsibilities will raise the question in vastly different factual settings. Despite their diversity, Congress decreed that most federal agencies should employ public procedures unless there was "good cause" not to, and admonished the courts not to let that clause become an "escape" from those requirements. Thus, courts have little choice but to examine each claim in context, weighing all the facts and circumstances to decide whether other legitimate interests outweigh the desirability of providing an opportunity for public participation in rulemaking.[35]

A review of the cases interpreting section 553(b)(B) could serve as a roadmap through the postwar history of American government. Those agencies facing situations defined by the political agenda as crises have made generous use of the exemption, often with the blessing of the courts. As that "crisis" is replaced by another one, courts demand more process, and different agencies face demands for swift action. Today, for example, deregulation-minded agencies which seek to dismantle regulations are facing challenges to their determinations that notice and comment would take too long.

A. Where Notice and Public Procedure May Be Contrary to the Public Interest

The agencies charged with administering wage and price controls throughout the economy under the Economic Stabilization Act of 1970 relied on section 553(b)(B)'s "contrary to the public interest" provision to institute price controls without prior notice and comment.[36] The situation contemplated by the Attorney General in 1947, where "the interest of the public would be defeated by any requirement of advance notice,"[37] was present in 1970. The need for swift action was so obvious that it was the subject of judicial notice.[38] Furthermore, the price controls, if announced in advance, would predictably worsen inflation as sellers rushed to raise prices before the controls took effect.[39] Therefore, given widespread concern about controlling inflation, reviewing courts had no difficulty in ratifying executive action imposing a "freeze" without prior public comment.[40]

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[35] Professor Kenneth Culp Davis expressed some "wonder whether expenditure of so much judicial energy on interpreting 'good cause' is exorbitant." K. Davis, 1982 Supplement to Administrative Law Treatise 124. Given the importance Congress attached to the rulemaking process, it may be argued that decisions to omit it deserve the most careful scrutiny, especially in light of the delicate balancing courts are called upon to do.

[36] *See* DeRieux v. Five Smiths, Inc., 499 F.2d 1321 (Temp. Emer. Ct. App.), *cert. denied*, 419 U.S. 896 (1974); Tasty Baking Co. v. Cost of Living Council, 529 F.2d 1005 (Temp. Emer. Ct. App. 1975).

The same recognition of a political emergency was shown in 1973, when the government set out to regulate the petroleum industry in the wake of the Arab oil embargo. Judges experienced firsthand the long lines and short tempers caused by fuel shortages, and upheld an agency decision to promulgate without delay regulations prohibiting discrimination by retail dealers in favor of "regular" customers.[41] Also approved were administrative decisions to effectuate without delay decontrol measures, designed to increase supply.[42] Courts reasoned that the purpose of decontrol would be frustrated by delay, since suppliers would hold back oil until the price rose, thus worsening the shortage.

As the crisis receded and the far-reaching nature of these emergency programs became more apparent, however, both courts and the Congress tended to become impatient with constant claims of good cause to act without notice and comment. As agency errors based on misinformation came to light, the value of public participation became more obvious. The Temporary Emergency Court of Appeals distinguished between the initial start-up phase and later phases of both the price control[43] and energy regulation programs,[44] invalidating several later regulations for failure to provide notice and comment. Likewise, in 1974, Congress added more stringent participation requirements to the Energy Act,[45] in recognition of the importance of making rules, regulations, and orders "which emanate from the greatest possible data base."[46] A waiver of those requirements was provided for, but only if "strict compliance is found to cause serious harm or injury to the public health, safety or welfare,"[47] obviously a more stringent criterion than the vague "contrary to the public interest" of section 553(b)(B).[48]

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[37] ATTORNEY GENERAL'S MANUAL at 31.

[38] *See* DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974).

[39] *Id.*

[40] *Id.* at 1333.

[41] Reeves v. Simon, 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975).

[42] Nader v. Sawhill, 514 F.2d 1064 (Temp. Emer. Ct. App. 1975); Metzenbaum v. Edwards, 510 F. Supp. 609 (D.D.C. 1981).

[43] *See, e.g.*, Tasty Baking Co. v. Cost of Living Council, 529 F.2d 1005 (Temp. Emer. Ct. App. 1975), drawing a distinction between regulations promulgated in November to avoid a regulatory vacuum, *id.* at 1014, and regulations promulgated the following February, May, June and November. *Id.* at 1015.

[44] *See, e.g.*, Mobil Oil Corp. v. Department of Energy, 610 F.2d 796 (Temp. Emer. Ct. App. 1979).

Another crisis occurred in 1979, when national attention was riveted on American hostages being held by Iran. The Immigration and Naturalization Service took steps to tighten controls on Iranian nationals in this country.[49] Linked as they were to the need to react to the crisis in international relations, reviewing courts found "good cause" for the agency to take such measures immediately, without pausing for notice and comment.[50] Indeed, situations where the advance notice and delay attributable to gathering public input would demonstrably worsen the problem the agency was trying to combat represent the strongest case for the good cause exemption.

The courts have also been asked to approve rules promulgated to deal with "emergency" situations which raise health and safety concerns. If public participation could not be solicited without endangering health and safety, courts have upheld the need for summary action, but they have recognized that such decisions are often candidates for political debate and have tried to provide for maximum public input, especially where the danger is more remote.

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[45] Federal Energy Administration Act, 15 U.S.C. § 766(i)(1)(B) and (C) (1976), redesignated Department of Energy Organization Act, 42 U.S.C. § 7191(e) (Supp. V 1981).

[46] 120 CONG. REC. 5459 (1974) (remarks of Representative Broyhill).

[47] 15 U.S.C. § 766(i)(1)(B)(1976), discussed in Shell Oil Co. v. FEA, 440 F. Supp. 876 (D. Del. 1977), *aff'd*, 574 F.2d 512 (Temp Emer. Ct. App. 1978).

[48] In light of those requirements, however, two courts have disagreed that the private sector's ability to adjust during rulemaking should override statutory public participation requirements, absent an emergency caused by shortage. The Department of Energy, anxious to clarify a provision of its pricing regulations which could result in discriminatory pricing, issued clarifying regulations. However, the practice in question was specifically permitted where a seller was bound by contractual arrangements. The agency invoked a waiver of the formal rulemaking procedures, on the grounds that sellers made aware of the ambiguity could use the public participation period to enter into long-term contracts and thereby evade the effect of the new rule. Two district courts held the waiver invalid, since any "threat" to the public was speculative at best and no "calamitous circumstances," such as disruption of supplies or imminent violence, existed. *See* Naph-Sol Refining Co. v. Murphy Oil Corp., 550 F. Supp. 297 (W.D. Mich. 1982); Mobil Oil Corp. v. Department of Energy, 547 F. Supp. 1246 (N.D.N.Y. 1982).

[49] One rule limited to 15 days the amount of time which could be granted to an Iranian national to depart voluntarily. 8 C.F.R. § 244.1 (1981).

[50] *See* Malek-Marzban v. INS, 653 F.2d 113 (4th Cir. 1981); Nademi v. INS, 679 F.2d 811 (10th Cir.), *cert. denied*, 103 S. Ct. 161 (1982). Reviewing courts also have held that these rules were exempt from § 553 under the exemption for matters involving a "foreign affairs function of the United States." 5 U.S.C. § 553(a)(1) (1982). Other courts have approved enforcement of stringent measures against Iranian nationals. *See, e.g.* Narenji v. Civiletti, 481 F. Supp. 1132 (D.D.C. 1979), and Yassini v. Crosland, 618 F.2d 1356 (9th Cir. 1980). *But see* Louis v. Nelson, 544 F. Supp. 973, (S.D. Fla. 1982), *aff'd sub nom.* Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), which held that INS policy designed to staunch the flow of Haitian refugees was *not* exempt under the foreign affairs exemption.

Some courts have accepted at face value agency claims of "emergency." For instance, in *Allegheny Airlines v. Village of Cedarhurst,*[51] an air traffic pattern was changed without notice and comment because there was evidence that the prior pattern was unsafe and immediate change was necessary "to promote [the] safety of the flying public."[52] Regardless of the fact that the earlier "unsafe" pattern had been in effect for 18 months, the courts did not question the agency's haste to protect air travelers. Also approved on the basis of emergency was the promulgation of a rule designed to foil airline hijackers by requiring airports to provide law enforcement officers to help screen passengers.[53]

In other cases, where an agency proposed to take action which might cause health hazards, those hazards were used as a reason to insist on allowing public participation. For instance, a court held that the Secretary of Agriculture should have taken input from the public before allowing the use of mechanically deboned meat in certain food products, stating that he could not suspend the APA's rulemaking requirements while he gathered information about the process for use in formulating final standards.[54]

Notice-and-comment procedures were also at issue in three cases involving pesticides and agricultural workers. Congress had provided that the Secretary of Labor could grant a waiver of child labor laws to permit 10- and 11-year-olds to harvest short-season crops.[55] Such waivers could be granted only if "the level and type of pesticides . . . would not have an adverse effect" on the young workers, and that determination must be "based on objective data submitted by the applicant."[56]

The Secretary issued a proposed rule which would have relied on safety standards set by other federal agencies such as EPA or OSHA.[57] Unfortunately, it became clear that existing federal safety standards had not been shown to be safe for children of ages 10 and 11. On the present state of the agency's knowledge, therefore, no safety standards could be set. Therefore, the final rule placed the burden of demonstrating safety on the employer seeking a waiver.[58]

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[51] 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956).

[52] 132 F. Supp. at 883–84. The case is discussed in Comment, *Agency Discretion to Accept Comments in Informal Rulemaking: What Constitutes "Good Cause" Under the Administrative Procedure Act?*, 1980 B.Y.U. L. Rev. 93, 100–101 (1980).

[53] Airport Operators Council Int'l v. Shaffer, 354 F. Supp. 79 (D.D.C. 1973).

[54] Community Nutrition Inst. v. Butz, 420 F. Supp. 751 (D.D.C. 1976).

[55] Fair Labor Standards Amendments of 1977, 29 U.S.C. § 213(c)(4)(A) (Supp. V 1981).

[56] *Id.*

[57] 43 Fed. Reg. 14,070 (1978).

The Secretary commissioned studies by a private consulting firm to develop criteria for evaluating waiver applications. As a result of those studies, the agency published a series of regulations, all without prior notice and comment, setting out "preharvest intervals," which were required time lags between spraying of various pesticides and entry of harvesters into the fields. On August 18, 1978, the department approved a list of 22 pesticides for use with preharvest intervals.[59] The Secretary adverted to the imminence of harvest seasons in finding notice and comment impracticable.[60] Based on later studies identifying two of the approved chemicals as suspected carcinogens, the agency modified its list, again without notice and comment, removing those chemicals from the approved list.[61]

Challenges based in part on failure to provide notice and comment came from opposing groups: organizations representing farm workers objected to promulgation of the "approved" list without prior notice and comment,[62] while growers claimed that the Secretary's action in deleting chemicals from the list required prior notice and opportunity to comment.[63]

In *National Association of Farmworkers Organizations v. Marshall*,[64] the Secretary convinced the district court that "the public interest in the expeditious issuance of safety standards for . . . crops with a short harvest season" provided the necessary "good cause."[65] But the court of appeals found the possible health risk to children outweighed the need to have rules in place. The possibility that children might be exposed to health hazards "indicated the need for the utmost care in development [of the standard] and exposure to public and expert criticism."[66] Also, the court noted that the agency had taken sevén months to issue the list and had consulted with grower groups, thus indicating that more public input would have been possible.[67]

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[58] 43 Fed. Reg. 26,562 (1978) (codified at 29 C.F.R. § 575.5 (1982)).

[59] A district court temporarily enjoined enforcement of the general statutory minimum age restrictions for the 1979 strawberry harvest in Washington, allowing some 3,900 children under the age of 11 to be employed. Washington State Farm Bureau v. Marshall, No. C78-135T (W.D. Wash. 1978), discussed in National Ass'n of Farmworkers Orgs. v. Marshall, 628 F.2d 604, 608–10 (D.C. Cir. 1980).

[60] *See* National Ass'n of Farmworkers Orgs. v. Marshall, 628 F.2d 604, 621 (D.C. Cir. 1980).

[61] 44 Fed. Reg. 22,509 (1979); 44 Fed. Reg. 24,058 (1979).

[62] National Ass'n of Farmworkers Orgs. v. Marshall, 628 F.2d 604 (D.C. Cir. 1980).

[63] Washington State Farm Bureau v. Marshall, 625 F.2d 296 (9th Cir. 1980).

[64] 628 F.2d 604 (D.C. Cir. 1980).

[65] *Id.* at 621.

[66] *Id.*

In contrast, the summary action of deleting certain substances to protect the young harvesters was held to have been justified by "good cause" in *Washington State Farm Bureau v. Marshall.*[68] When new information became available, the 1979 strawberry season was already at hand and there was an immediate need to protect the children and inform interested growers prior to spraying.[69] Both courts found that the goal of Congress was to protect child harvesters, and therefore approved summary action designed to increase protection, but disapproved such action where the effect might be to increase risks.

In an earlier case,[70] the Fifth Circuit reversed a decision by the Department of Labor that health hazards justified issuing an emergency temporary standard restricting use of an agricultural chemical without prior public participation. In that instance, however, Congress had provided in the Occupational Safety and Health Act[71] for ample public participation in the difficult decision of weighing economic harm to industry and to consumers deprived of useful substances against the health hazards to workers. The court pointed to the enabling legislation which provided that only "grave danger" to employees from exposure to toxic substances would justify emergency procedures.[72] Where employees experienced only minor symptoms, which were fleeting and easily curable, no such emergency existed and full notice and comment should have been provided. Without the special statute, however, it seems unlikely that any court would have ordered the Secretary to force workers to experience even minor illness in order to take public comment.

In one group of cases interpreting the good cause exception, however, the courts have held that public health concerns, while entitled to respect, would not have been seriously jeopardized by allowing public comment. Those cases grew out of the Environmental Protection Administration's decision to promulgate without prior notice and comment lists of areas which did not meet federal air quality standards.[73] The rule in question was a step in the congressionally mandated process of achieving national air quality standards for which a rigid timetable was specified.[74] The states were directed to submit to the EPA, by December 5, 1977, proposed designations of areas in the state which met national air quality standards (attainment), those did not meet the standards (nonattainment), or for which there were insufficient data to permit classification. By February 3, 1978, the administrator was to promulgate each such list with any modifications he deemed necessary, allowing the states to formulate implementation plans by January 1, 1979.[75] On March 3, 1978, one month after the congressional deadline, the administrator promulgated a list of nonattainment areas as a final rule, effective immediately.[76] No notice-and-comment period was provided, on the ground that the tight schedule Congress had set made public procedure "impracticable and contrary to the public interest."[77]

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[67] *Id.* at 622.

[68] 625 F.2d 296 (9th Cir. 1980).

[69] *Id.* at 307.

[70] Florida Peach Growers Ass'n v. Department of Labor, 489 F.2d 120 (5th Cir. 1974).

[71] 29 U.S.C. §§ 651–678 (1976).

[72] 29 U.S.C. § 655(c)(1) (1976).

[73] 43 Fed. Reg. 8962 (1978).

This action spawned at least 43 challenges in 10 judicial circuits,[78] most often by heavy industry which anticipated restrictions on its operations as a result of the classification. In one case,[79] however, review was sought by a state which objected that the administrator's action, based on faulty analysis, put certain states at a disadvantage vis-a-vis other states. This challenge became a conflict between states of the industrial northeast, widely designated "nonattainment," and states in the Sunbelt, not so designated, and therefore not required to establish programs to reduce pollution, who intervened in support of the administrator.[80]

The nonattainment classification rule seemed an unlikely vehicle for a major test of the "good cause" provision. First, the designation was concededly an intermediate step in a lengthy procedure of preparing state implementation plans, and was characterized as a "working hypothesis"[81] which would be subject to challenge before any person suffered harm or prejudice therefrom. Second, the agency provided a post-promulgation comment period, and made some changes as a result of comments received.[82] Thus, no one could show that his input had been precluded from consideration. Third, the Agency was clearly burdened by the stringent deadlines set by Congress, which it failed to meet even without subjecting the state-proposed designations to notice-and-comment procedures. Reviewing courts agreed that use of public procedures would have delayed the designations still further, in contravention of Congress' express direction.[83] Fourth, the haste mandated by Congress was motivated by public health concerns, among the strongest justifications for summary procedure.[84] Fifth, the rule itself, while obviously involving some judgment (did or did not air quality in a given area meet some pre-designated standard?), seemed unusually susceptible to later review for arbitrary or capricious decisionmaking. If some defect in the raw data or its analysis were brought to the Agency's attention, reconsideration of the designation on the basis of the new information would seem mandatory and relatively easy to assure.

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[74] The Clean Air Act Amendments of 1977, Pub. L. No. 95–95, 91 Stat. 685.

[75] 42 U.S.C. § 7407(d) (Supp. V 1981).

[76] 43 Fed. Reg. 8962 (1978).

[77] *Id.*

[78] *See* Western Oil & Gas Ass'n v. EPA, 633 F.2d 803, 808 n.5 (9th Cir. 1980).

[79] New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980).

[80] The states of Maine, Connecticut, Massachusetts, New York, Rhode Island, and Vermont, the District of Columbia, and the city of New York intervened in favor of New Jersey, while the states of Arkansas, Georgia, Missouri, and New Mexico intervened in favor of EPA. *Id.* at 1042.

[81] *See* Sharon Steel Corp. v. EPA, 597 F.2d 377, 381 n.9 (3d Cir. 1979).

[82] The administrator stated the agency would accept public comments received within 60 days of the promulgation of the rule. 43 Fed. Reg. 8962 (1978). The administrator

Finally, this situation seemed unlike others where courts have been reluctant to allow an agency to lightly disregard the congressional command that comments be solicited relatively early in the decisionmaking process. Once the agency has publicly committed itself to a course of action, "psychological and bureaucratic realities"[85] indicate that it will be less open to criticism or suggestions of alternative approaches. In these cases, however, Congress had directed EPA to review a state's decision on a yes or no question: does this air comply with the standard? The task was relatively straightforward and simple, and it seems difficult to imagine great bureaucratic attachment to a list compiled by someone else. If the list were shown to be based on incomplete or incorrect information, correction would be expected no matter when the new information came to light. Indeed, the entire process was designed to measure an ever-changing reality, and adjustments would be expected as conditions changed.

Despite these considerations, the courts in five circuits[86] sustained challenges to EPA's decision to promulgate the list without notice and

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did make some changes in response to comments received. United States Steel Corp. v. EPA, 605 F.2d 283, 291 (7th Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980); Republic Steel Corp. v. Costle, 621 F.2d 797, 803 (6th Cir. 1980).

[83] *See, e.g.*, Sharon Steel Corp. v. EPA, 597 F.2d 377, 380 (3d Cir. 1979).

[84] *See* cases discussed *supra* notes 54–72.

[85] New Jersey v. EPA, 626 F.2d at 1050.

[86] Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979); New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980); United States Steel Corp. v. EPA, 595 F.2d 207 (5th Cir. 1979); Western Oil & Gas Ass'n v. EPA, 633 F.2d 803 (9th Cir. 1980); United States Steel Corp. v. EPA, 649 F.2d 572 (8th Cir. 1981). *Contra*, holding the Administrator did have good cause, were Republic Steel Corp. v. Costle, 621 F.2d 797 (6th Cir. 1980), United States Steel Corp. v. EPA, 605 F.2d 283 (7th Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980). The

comment, largely on the grounds that the agency *could have* published the state's list as a proposed rule with little extra delay.[87] The courts chose to reaffirm the importance of the notice-and-comment procedure without once pointing to any input the challenger would have provided had he been given his opportunity. Furthermore, they were unpersuaded that this procedural lapse should be considered harmless error, thus reaffirming the value of an opportunity to persuade without requiring the challenger to show that the outcome would have been different had comments been accepted. In the majority view, the process should and could have included public comment without serious harm to the public health, since this action by EPA was merely a step in the process of formulating state implementation plans, and soliciting comment would have added little delay.

Courts have seen the need to protect human health and safety as one of the paramount concerns of government. Any action which might increase risks to health and safety should receive the most careful consideration by the agency while those which directly reduce known risks may be taken as promptly as possible. Of course, if Congress has specified a different balance between health concerns and the value of public participation, agencies and courts are bound to respect that judgment.[88] Courts also struggle to find ways to accommodate both values, but absent specific legislative guidance, in matters of health and safety they generally rank the need to extend protection higher than the need to allow debate about it when one or the other must give way.

Not every claim of "emergency" or "risk to life" will persuade, however. Perhaps the sharpest clash between values of debate and concern for health and safety occurred in the *Baby Doe* case.[89] The district court reviewing the decision to institute a "hotline" was highly critical of the quality of decisionmaking on this issue, and agreed with petitioners that the Secretary of Health and Human Services had acted without considering "many highly relevant factors central to any application of [federal antidiscrimination law] to medical care of newborn infants."[90]

Judge Gesell, himself the son of a well-known pediatrician,[91] re-

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reasoning of the courts which upheld the Administrator was strongly criticized in Note, *The "Good Cause" Exceptions: Danger to Notice and Comment Requirements Under the Administrative Procedure Act,* 68 GEO. L. J. 765 (1980).

[87] United States Steel Corp. v. EPA, 595 F.2d 207, 213 (5th Cir. 1979).

[88] *See supra* text accompanying notes 70–72.

[89] American Academy of Pediatrics v. Heckler, 561 F. Supp. 395 (D.D.C. 1983). The facts are related *supra* text accompanying notes 1–7.

[90] 561 F. Supp. at 399.

[91] *See* N.Y. Times, Apr. 15, 1983, at 1, col. 4.

ferred to the affidavit of a doctor at Children's Hospital National Medical Center stating that severe disruptions of hospital routine would result if any anonymous tipster could trigger the sudden descent of a *Baby Doe* squad onto the scene. Such intrusions, when medical decisions must be made on short notice, can hardly be presumed to produce higher quality care for the infant.[92]

Also criticized by the court was the failure to weigh the costs to the integrity of families if parental wishes were no longer to be recognized as legitimate. Furthermore, failure to address difficult questions of funding or allocation of scarce resources between defective newborns and other patients helped to convince the court that "haste and inexperience have resulted in agency action based on inadequate consideration."[93]

The problems with the rule could obviously have been pointed out during a notice-and-comment period had the agency provided for one. The court brushed aside claims of "lives at risk," noting that there was no emergency, since the problem had been long-standing, and that there was no evidence of any dramatic change in circumstance that would suddenly increase the risk.[94]

In summary, the court invalidated the rule, concluding that it was so ill-considered and ill-advised as to be "arbitrary and capricious," as well as procedurally improper.[95] In her haste to protect future Baby Does, the Secretary had not considered other legitimate concerns and may have jeopardized the safety of other newborns. It is just such "tunnel vision" which notice-and-comment procedures are designed to correct, and the case illustrates their importance, even in "life-or-death" situations.

B. Where Notice and Public Procedure May Be Unnecessary

Courts on several occasions have considered when public procedures are "unnecessary" within the meaning of section 553(b)(B). The legislative history indicates that the draftsmen had in mind cases involving "minor or merely technical amendment in which the public is not particularly interested."[96] Although other interpretations have been advanced, courts have been reluctant to hold public comment

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[92] 561 F. Supp. at 399 n.5.
[93] *Id.* at 400.
[94] *Id.* at 401.
[95] *Id.* at 403.
[96] S. Doc. No. 248 at 200, 258.

"unnecessary" when substantial government action is under consideration.

In *National Helium Corp. v. Federal Energy Administration*,[97] notice and comment were held to be "unnecessary." The Federal Energy Administration had issued amendments to its regulations in anticipation of the expiration of the Economic Stabilization Act.[98] The amendments were considered technical in nature, designed to smooth the transition from regulations promulgated by the Cost of Living Council under the Stabilization Act to regulations based on the Emergency Petroleum Allocation Act.[99] The court agreed that since the amendments in question were largely technical and did not substantively alter the existing framework or produce any detrimental impact on the rights of the parties regulated, prior notice and opportunity to comment were "unnecessary."[100] The court noted the similarity between these amendments and an interpretive rule,[101] which Congress exempted from notice-and-comment requirements, but since the agency did not urge that the "interpretive rule" exception should apply, the court affirmed the agency judgment that notice and comment were "unnecessary."

Not all agency reliance on the "unnecessary" clause has been upheld, however. The courts have taken seriously Congress's admonition that the exemption was intended to be a narrow one. For example, the Third Circuit disagreed that public participation was "unnecessary" when the Federal Power Commission announced a rule which would impose an obligation to pay compound interest on refunds of overcharges resulting from new rates subsequently found to be unjustified.[102] Given the substantial sums of money involved and the large number of companies affected, the rule could not be classified as "minor or emergency in character."[103] The agency also argued that public participation was "unnecessary" because the agency could have imposed this obligation by adjudicatory order.[104] That contention was expressly rejected. If the agency chose to proceed by issuing a general rule, the APA specified the procedures to be used.

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[97] 569 F.2d 1137 (Temp. Emer. Ct. App. 1977).

[98] 39 Fed. Reg. 11,768 (1974); 39 Fed. Reg. 12,353 (1974).

[99] The Economic Stabilization Act of 1970 expired on April 30, 1974. *See* National Helium Corp. v. FEA, 569 F.2d 1137, 1141 (1977). The Federal Energy Office, established by the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93–159, 15 U.S.C. §§ 751–760 (1982), adopted and recodified the regulations in effect under the Stabilization Act. 569 F.2d at 1141.

[100] 569 F.2d at 1146.

[101] *Id.* at 1145. Congress exempted "interpretative rules" from the notice-and-comment requirements in 5 U.S.C. § 553(b)(A)(1982). For an evaluation of that exemption, see Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy under the A.P.A.*, 23 Ad. L. Rev. 101 (1971).

[102] Texaco, Inc. v. FPC, 412 F.2d 740 (3d Cir. 1969).

[103] *Id.* at 743.

[104] *Id.* at 744.

The FPC's contention that no procedures were required if it chose to use a rule to address a recurring problem, rather than individual orders, seems curious indeed. The agency's argument might be germane to the substantive issue of whether it had the power to impose the obligation at all, but for the agency to argue that no rulemaking procedure was necessary because it could have taken the equivalent action by means of very elaborate adjudicative procedures seems a non sequitur. If adjudicatory procedures are used, those affected have much *more* opportunity than is provided by notice and comment to be informed about and participate in governmental decisionmaking.[105] The usual argument in cases challenging attempts to avoid repetitive case-by-case determinations by issuing general rules is that notice and comment is not enough; challengers urge that the protections of a formal adjudication are statutorily or constitutionally required.[106]

Also rejected was a claim by the commissioner of the Food and Drug Administration that a change in regulations to conform them to new legislation could be accomplished without notice and comment.[107] The court reached this conclusion "with regret,"[108] given that over 15 years had already elapsed since the FDA had begun its efforts to regulate vitamin and mineral preparation.[109] Eleven years after its first notice of proposed rulemaking, the FDA had issued regulations on August 2, 1973, after holding lengthy hearings.[110] On review, the court stayed the regulations and remanded the case to the FDA for additional procedures.[111] After another hearing was held, heavy lobbying by the health food industry caused Congress to withdraw from the FDA the power to issue certain parts of the regulations.[112]

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[105] "On the record" adjudication is subject to trial-type procedures set out in 5 U.S.C. §§ 554, 556, and 557. These sections require separation of decision-makers from investigatory or adjudicatory functions, and set forth other procedural rights.

[106] The Supreme Court rejected the contention that more than notice and comment was required in United States v. Florida E. Coast Ry., 410 U.S. 224 (1973). That of course does not mean that *no* procedure is required when government acts.

[107] National Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377 (2d Cir. 1978).

[108] *Id.* at 383.

[109] The early stages of the proceeding were conducted under a provision of the Federal Food, Drug, & Cosmetic Act, § 701, 21 U.S.C. § 371(e)(3)(1976), which requires an evidentiary hearing for rulemaking. The first hearing required over 22 months. On review of the rules issued, the Second Circuit remanded to the FDA for further hearings. The reopened hearings lasted six days and added 1,119 pages of transcript to the 32,405 developed at the original hearings. 572 F.2d 377 at 379–80.

[110] 38 Fed. Reg. 20,708–18, 20,730–40 (1973).

[111] National Nutritional Foods Ass'n v. FDA, 504 F.2d 761 (2d Cir. 1974), *cert. denied*, 420 U.S. 946 (1975).

[112] Pub. L. No. 94–278, 90 Stat. 401 (1976), especially § 501(a). The legislation also

Had the agency's action in response been limited to excising those portions of the proposed regulations placed beyond its authority, public comment would indeed have been superfluous, since the decisionmaking had taken place in the open political arena of the Congress, and the agency had no discretion to exercise. In this instance, however, the legislation also imposed new duties on the agency with respect to labeling,[113] and the rules in question addressed these new responsibilities. Given the long and bitter battle between the FDA, which was determined to save consumers from wasting money on vitamin and mineral products they do not need, and groups which believe that such products *are* needed for good health, the Second Circuit saw "no basis for the commissioner's believing that the public would not be 'particularly interested' in his next move."[114] In light of the intense interest on the part of some members of the public in these regulations, which did represent an exercise of discretion, public participation could not be deemed "unnecessary," and it was hardly impracticable, since so many years had already passed.

Courts have also been asked to approve agency rules issued without prior notice and comment because some other methods of gathering input made the procedures "unnecessary." Some courts have accepted this argument,[115] especially when the agency labored under time pressures not of its own making; most courts have not.

In the two cases where the argument was accepted, both involving the Environmental Protection Agency,[116] the courts agreed that notice and comment were not required before the Agency adopted a state-submitted implementation plan. Instead of focusing on lack of public interest in the rule, however, both courts stressed that there had been ample opportunity to comment at state hearings as the states developed their plan, and pointed to the alacrity demanded by Congress.[117] To allow parties another opportunity merely to restate their contentions would normally be a useless, wasteful, time-consuming, and duplicative exercise.[118] Thus, given the time con-

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directed the Secretary of Health, Education, and Welfare to use the notice-and-comment procedure to conform his regulations to the new legislation rather than to the trial-type procedures prescribed by § 701(e) of the Food, Drug & Cosmetic Act. *Id.* at § 501(b).

[113] *Id.* at § 501(a).

[114] 572 F.2d at 385.

[115] *See, e.g.,* Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973); Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir. 1973), *vacated and remanded,* 427 U.S. 902 (1976).

[116] *Id.*

[117] 477 F.2d at 502; 481 F.2d at 10.

[118] 477 F.2d at 502; 481 F.2d at 8.

straints imposed by Congress, allowing notice and comment was both "impracticable and unnecessary."[119]

Absent the time pressure specified by Congress, however, "good cause" would likely not be present.[120] An opportunity to participate in state proceedings is not a perfect substitute for opportunity to persuade the federal agency. Even if the contentions are likely to be duplicated, a change in the listener may make some difference. The perspectives of the two agencies differ, and they may respond in differing arguments. Furthermore, procedures for giving notice would differ, and some interested persons who check the *Federal Register* might not be aware of the state proceedings.[121] Therefore, in the intensely political process of deciding how clean our air should be, another round of public input might not have been a clear waste of time. However, when balanced against the urgency mandated by Congress, the courts held that notice and comment at that stage would be both impracticable and unnecessary.

Some courts have held that even if prior notice and comment were not provided, an agency which accepts comments after the rules are promulgated has "cured" whatever errors it may have made. Although this argument often does not rest explicitly on the "unnecessary" clause, and also "mixes notions of mootness, harmless error, and minimal injury,"[122] it is based in part on the idea that as long as some effort is made to gather public reaction, strict compliance with section 553 is "unnecessary."

Although some courts have validated agency substitution of a post-promulgation comment period for the section 553 sequence,[123] most have not.[124] Courts have noted that the timing of comments is not an inconsequential matter. The procedures mandated by Congress "ensure that affected parties have an opportunity to participate in and influence agency decisionmaking at an early stage, when the agency is more likely to give real consideration to alternative ideas."[125]

Once regulations are promulgated, both the agency and the public are likely to consider the matter closed, even if the agency solicits comments and promises to keep an open mind.[126] The very act of labeling the regulations "Final" indicates a degree of attachment to the decision. "Psychological and bureaucratic realities"[127] suggest that once the agency has gone on public record with its final decision, it will be less willing to reconsider its assumptions or reevaluate roads not taken. Likewise, members of the public may consider offering comments a waste of time, and many choose instead to include any comments or criticism in a petition for judicial review.[128]

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[119] 477 F.2d at 503; 481 F.2d at 8.

[120] In both cases, the courts based their holdings on the time pressure *combined with* the state hearings.

[121] Comment, *supra* note 52, at 103.

[122] United States Steel Corp. v. EPA, 595 F.2d 207, 214 (5th Cir. 1979).

[123] *See, e.g.*, Levesque v. Block, 723 F.2d 175 (1st Cir. 1983); *see also* United States Steel Corp. v. EPA, 605 F.2d 283 (7th Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

[124] *See, e.g.*, City of New York v. Diamond, 379 F. Supp. 503 (S.D.N.Y. 1974); Kelly v. Department of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972).

[125] United States Corp. v. EPA, 595 F.2d 207, 214 (5th Cir. 1979).

A new interpretation of the "unnecessary" exemption has been urged on two courts,[129] thus far without success. The Federal Energy Regulatory Commission revoked a rule following a congressional veto;[130] the Environmental Protection Agency postponed an effective date indefinitely;[131] neither agency afforded notice or opportunity to comment. When challenged, the FERC defended its actions in part by claiming that public procedures were "unnecessary."[132] The agency contended that one option which had always been present since the regulations were first proposed was that the agency issue no rule at all. Thus, the agency urged that since the public had the opportunity to address that possibility, any further notice and comment when the agency decided to return to the "no rule" state was "unnecessary."[133]

The District of Columbia Court of Appeals gave short shrift to that argument.[134] As a matter of statutory construction, the contention seems hard to reconcile with the APA's inclusion of "repealing a rule" within the definition of rulemaking for which notice-and-comment procedures are required.[135] If the procedure which preceded adoption served to cover the question of repeal as well, the draftsmen should not have included repeal as a type of rulemaking. The court went on to note that a decision to repeal a rule should be subjected to notice and comment, if possible, "to ensure that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal."[136]

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[126] Kelly v. Department of Interior, 339 F. Supp. 1095, 1101 (E.D. Cal. 1972).

[127] New Jersey v. EPA, 626 F.2d 1038, 1050 (D.C. Cir. 1980).

[128] See testimony that plaintiff organization did not comment during the post-promulgation comment period because "the agency had already made up its mind." Philadelphia Citizens in Action v. Schweiker, 527 F. Supp. 182, 192 (E.D. Pa. 1981), *rev'd*, 669 F.2d 877 (3d Cir. 1982).

[129] Community Energy Council of America v. Federal Energy Regulatory Comm'n, 673 F.2d 425 (D.C. Cir. 1982); Natural Resources Defense Council, Inc. v. EPA, 683 F.2d 752 (3d Cir. 1982).

[130] The Federal Energy Regulatory Commission revoked its "incremental pricing" program after its rule was disapproved by the House of Representatives. The Natural Gas Policy Act provided that the rule would take effect only if neither house disapproved it within 30 days. 15 U.S.C. § 3342(c) (1982).

[131] EPA indefinitely postponed the effective date of final amendments dealing with the discharge of toxic pollutants into publicly owned treatment works. 46 Fed. Reg. 19,936 (1981). The Clean Water Act required EPA to promulgate regulations requiring industry to pretreat wastes by removing pollutants. *See* 33 U.S.C. § 1317(b)(1) (Supp. V 1981).

[132] *See* 673 F.2d at 445–46.

[133] *Id.*

[134] *Id.*

The Third Circuit agreed,[137] and also found unpersuasive the other reasons given for EPA's summary decision to delay the effective date of final rules. Neither the imminence of the scheduled effective date nor the agency's desire to prepare a regulatory impact statement, as required by Executive Order No. 12,291,[138] justified the agency's omission of notice and comment. The court held that EPA could have complied with both the APA and the Executive Order.[139] Given the importance of soliciting public input before an agency decides to make a sharp change of course, particularly when the rules in question had been developed after years of notice-and-comment procedures, the court held the agency's action was not justified by "good cause."[140]

This reasoning seems unassailable as a matter of statutory construction and also appears to be wise policy. The adoption of a rule alters the legal landscape, creating new expectations and reliance. Thus, the agency cannot claim that it is simply returning to the status quo ante. As efforts to deregulate have made very clear, those affected by regulation often have a strong interest in the rules already in place. Thus, as a matter of sound political judgment, open debate on deregulatory moves should be provided.

C. Where Notice and Public Procedure May Be Impracticable

Most claims of "good cause" rely at least in part on the "impracticable" clause. The agency weighs the extra delay which full notice-and-comment procedures entail against the need to get rules in place as quickly as possible. Sometimes the haste is required because of the nature of the events being regulated;[141] in recent times, agencies have also faced deadlines imposed by courts or the Congress.[142] The courts have generally been alert to the danger that if an approaching deadline were automatic "good cause," agencies might wait until the eleventh hour to issue rules, rather than organize their procedures to allow notice and comment within the time allotted.[143]

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[135] Section 551(5) includes "agency process for formulating, amending, or *repealing* a rule" within the definition of "rulemaking." 5 U.S.C. § 551(5) (1982) (emphasis added).

[136] 673 F.2d at 446.

[137] Natural Resources Defense Council, Inc. v. EPA, 683 F.2d 752 (3d Cir. 1982).

[138] Executive Order No. 12,291, 46 Fed. Reg. 13,193 (1981), requires a Regulatory Impact Analysis to accompany all major rules, defined as a regulation likely to affect the economy by $100 million or more a year, or to have other specified effects. Exec. Order No. 12,291 § 3(b).

[139] 683 F.2d at 765.

[140] *Id.* at 767.

In contrast, courts have generally ratified agency decisions to issue rules to meet unexpected emergencies caused by events over which the agency had little control. In such instances they have tried to accommodate the value of public participation by insisting that such rules be no broader and last no longer than necessary to meet the emergency.

The clearest example is provided by *American Federation of Government Employees v. Block.*[144] In that case, as a result of a lawsuit in Arkansas alleging discrimination in the enforcement of inspection rates in poultry processing plants, the Secretary of Agriculture was under court order "to use uniform inspection rate standards and to apply and enforce [them] uniformly."[145] The court further ordered the Secretary to report in detail within two weeks the manner and form of compliance with the court's injunction.[146]

Three days before the court's deadline, the Department of Agriculture published two final and immediately effective regulations.[147] The regulations had already been prepared as proposed rules based on recommendations made by a study group of inspection officials.[148] The Arkansas court had refused the Department's request to dismiss or stay the proceedings until notice and comment on the proposed rules could be completed, and had issued a preliminary injunction declaring existing informal guidelines "null and void."[149] Citing the need to comply with the court order as well as the need "to assure that the consumer is adequately protected," the regulations were issued without prior notice and comment and made immediately effective. Thus, both "good cause" provisions were at issue.[150]

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[141] *See, e.g.*, the problem caused when allocation of landing "slots" unexpectedly could not be accomplished by agreement. Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309 (8th Cir. 1981), discussed *infra* text accompanying notes 171–178.

[142] The "nonattainment" rule, discussed *supra* text accompanying notes 73–87, is one example of a congressional deadline. Such "agency forcing" legislation is discussed in B. ACKERMAN & W. HASSLER, CLEAN COAL/DIRTY AIR (1981). For an example of an agency facing a judicially imposed deadline, *see* American Fed'n of Gov't Employees v. Block, 655 F.2d 1153 (D.C. Cir. 1981).

[143] *See, e.g.*, Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581 (D.C. Cir. 1981).

[144] 655 F.2d 1153 (D.C. Cir. 1981).

[145] Arkansas Poultry Fed'n v. Bergland, No. LR-C-78-395 (E.D. Ark. Apr. 3, 1979), cited at 655 F.2d 1154–55.

[146] *Id.*

[147] 44 Fed. Reg. 22,047, 44 Fed. Reg. 22,049 (1979).

[148] 655 F.2d at 1155.

[149] *Id.* at 1157.

In reviewing the Secretary's response to the judicial order, the D.C. Circuit found the requisite "good cause" to get regulations in place immediately.[151] The nullification of existing guidelines created a need for guidance to avoid confusion, economic harm to processors, and possible harm to consumers in the form of poultry shortages or increased prices.[152] The court broke new ground, however, by refusing to approve "*permanent* regulations of this breadth,"[153] stressing that any action taken in a rare "emergency" situation need only be temporary, pending public notice-and-comment procedures.[154] Noting that in this case the detailed regulations responded to much more than the exigencies of the moment, the court stressed the need for public procedures "before they are chiseled into bureaucratic stone."[155] Therefore, the regulations were upheld, but only as interim rules, since the court saw no "good cause" for eliminating public participation in formulating final rules.[156]

The D.C. Circuit recently upheld as within the "good cause" exemption agency action taken without notice and comment to defer for a short time the effective date of a regulation mandating additional mine safety equipment.[157] In 1978, the Mine Safety and Health Administration of the Department of Labor had promulgated a final regulation requiring mine operators to equip all underground miners with "self-contained self-rescuers" designed to provide oxygen for miners trapped in mine accidents.[158] The regulation as originally issued carried an effective date of December 21, 1980, thus providing a two-year period for compliance.[159]

The long lead time for this regulation was to provide time for MSHA to field test and approve specific equipment.[160] Such testing had been delayed because of safety concerns about the units. Until such fears were allayed, the testing program could not even start. The last approval for testing was not obtained until November 19, 1980.[161] On December 5, 1980, with only a small number of devices available and the compliance date about two weeks away, MSHA determined that the implementation date should be pushed back to June 21, 1981.[162] MSHA made the change without notice and comment, "in view of the imminence of the deadline," claiming it would be impracticable and contrary to the public interest to do otherwise.[163] Organizations representing the miners petitioned for review of the December 5 order.

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[150] The court noted that the purpose of § 553(d) was informing affected parties and affording them a reasonable opportunity to adjust. The court found that § 553(b) is designed to allow interested parties to participate in the formulation of the rules, an even more significant purpose. 655 F.2d at 1156.

[151] *Id.* at 1157.

[152] *Id.*

[153] *Id.* (emphasis in original).

[154] *Id.* at 1157–58.

[155] *Id.* at 1157.

[156] *Id.* at 1158.

[157] Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573 (D.C. Cir. 1981).

[158] 43 Fed. Reg. 54,241 (1978).

[159] *Id.* at 54,246.

[160] *Id.* at 54,244.

The D.C. Circuit found this case an extremely close one.[164] The court noted that special scrutiny must be given when agencies plead lack of time, lest the agencies "simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures."[165] In this case, however, the court saw no such deliberate agency abuse.

The actions of the agency showed instead that the agency was determined to implement the regulations on schedule if at all possible, and was ultimately forced to postpone the date by circumstances beyond its control when it was truly too late to follow APA procedures.[166] The court was impressed that the date was delayed only a relatively short time, and that the agency had used the period between the December 5 rule and an expedited court hearing to complete necessary field testing. All of the circumstances indicated to the court that the agency was acting in good faith to implement the regulations as soon as possible.[167]

The court stressed that even in this instance, the question of whether public participation was impracticable was an extremely close one.[168] It reiterated that "exceptions to the APA provisions will be only reluctantly countenanced."[169] In this instance, because of snags and delays in testing the equipment which were not attributable to the agency, the original implementation date became unenforceable, and no amount of comment would have changed that fact. The court approved the agency's decision to devote energy to completion of field testing rather than a round of public comment.[170]

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[161] 653 F.2d at 577.

[162] 45 Fed. Reg. 80,501 (1980).

[163] *Id.* at 80,502.

[164] 653 F.2d at 575.

[165] *Id.* at 581.

[166] *Id.* at 581–82.

[167] *Id.* at 582.

[168] The court noted a combination of circumstances that "render this a special, possibly unique, case." *Id.* at 581.

[169] *Id.* at 582, quoting New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

Another recent case upheld the Federal Aviation Administration's limited response to an emergency situation.[171] The FAA regulates and limits the number of takeoffs and landings at airports. Generally, available slots are allocated among airlines by voluntary agreement. In the fall of 1980, for the first time, the airlines were unable to reach agreement on allocation of slots at National Airport in Washington, D.C. On October 14, the FAA was notified that no agreement could be reached for the busy holiday travel period beginning December 1.[172]

At that point, the allocation could not be long delayed. The airlines needed firm information to make any necessary schedule adjustments and rearrange existing reservations. The traveling public also needed the information to make holiday travel plans. In fact, the agency faced a November 6 deadline for submission of pages for the Official Airline Guide, which would show the new schedules.[173]

Within two days, on October 16, the agency solicited comments on how to allocate the slots for the period from December 1, 1980, to April 26, 1981.[174] The agency did not propose any specific allotment mechanism and limited the comment period to seven days ending October 23.[175] Then, on October 29, the agency issued a Special Federal Aviation Regulation, effective immediately, making the allocation for the December 1–April 26 period.[176]

The court agreed with the Secretary of Transportation that the urgent necessity for rapid administrative action to solve an unprecedented problem constituted "good cause" under both sections 553(b)(B) and 553(d).[177] The limited duration of the rule, as well as the Secretary's prompt action in instituting rulemaking proceedings proposing several procedures for allocating slots on a long-term basis, convinced the court that the secretary had acted responsibly both to solve the immediate problem, and to take full public input in devising rules to prevent the problem from arising in the future.[178] The Eighth Circuit agreed that under the circumstances, the "good cause" requirement was met.

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[170] Government counsel's assurance at oral argument that field testing had been completed and implementation on June 21 was fully anticipated bolstered the court's impression that MSHA was acting in good faith to implement the regulations as soon as possible. 653 F.2d at 582. Implementation did not in fact begin until October, 1982. Wall St. J. Oct. 5, 1982, at 1, col. 5.

[171] Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309 (8th Cir. 1981).

[172] 645 F.2d at 1312–13.

[173] *Id.* at 1321.

[174] 45 Fed. Reg. 69,403 (published on October 20, 1980).

[175] Thirty-seven comments were submitted, despite the very abbreviated comment period. 645 F.2d at 1313.

[176] *Id.*

[177] *Id.* at 1321.

Another example of "good cause" stemming from unexpected events is provided by *National Federation of Federal Employees v. Devine*.[179] At issue was a decision by the Director of the Office of Personnel Management to issue a rule on Friday, November 6, postponing the period during which employees or retired annuitants could transfer enrollment from one participating health plan to another. That period was scheduled to begin the following Monday, November 9.[180]

Because of federal budget cuts, OPM had ordered participating health plan carriers to reduce proposed benefits under the 1982 contracts.[181] Negotiations with the carriers were still underway, and several lawsuits challenging the reductions were pending in the federal courts.[182] The carriers argued that until they had better information on the actuarial risks the new benefit provisions would entail, they risked massive losses if the scheduled "open season" was held and employees were permitted to transfer freely among plans.[183] No accurate information about terms of the 1982 contract was available, so informed choice by employees would be impossible.[184] Under the circumstances, the D.C. Circuit agreed that the OPM had little choice but to postpone the "open season."[185]

The court noted that "emergency" situations generally call for temporary solutions,[186] and commended OPM for its decision to solicit public input on the question of how to provide future "open seasons" without endangering the financial stability of the health care programs.[187] Again, the court stressed the agency's good faith in reacting summarily to the immediate problem while conducting full notice and comment on long-range policy.[188]

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[178] On October 21, 1980, the Secretary issued a Notice of Proposed Rulemaking, proposing several procedures for allocating slots at National Airport on a long-term basis. 45 Fed. Reg. 71,236.

[179] 671 F.2d 607 (D.C. Cir. 1982).

[180] *Id.* at 608–09.

[181] *Id.* at 609 n.1.

[182] *Id.* at 609.

[183] *Id.* at 611.

[184] *Id.*

[185] *Id.* at 610.

[186] *Id.* at 613.

[187] On November 18, 1981, OPM had instituted notice-and-comment procedures regarding future rescheduling of open seasons. 46 Fed. Reg. 55,679.

[188] 671 F.2d at 613.

Courts have not been so understanding when the short time available is in part because the agency failed to plan adequately and began too late.[189] For example, the Temporary Emergency Court of Appeals invalidated regulations promulgated without notice and comment by the Federal Energy Administraton in a case where the agency had been aware for 16 months that regulations would be required.[190] Likewise, the First Circuit struck down interim regulations implementing amendments to the Social Security Act which were published 22 days after the amendments took effect.[191] The court pointed to the 14-month period between the passage of the amendments and their effective date in rejecting the agency's claim of "good cause."[192]

In cases such as these, the courts can point to language in the legislative history admonishing the agencies "to proceed with the convenience or necessity of the people affected as the primary consideration, so that an agency may not itself be dilatory and then issue a rule requiring compliance forthwith."[193]

D. "Good Cause" to Waive Delayed Effective Date

Section 553(d) requires that a rule must ordinarily be published in the *Federal Register* at least 30 days before its effective date. That section contains its own "good cause" exception.[194]

Some courts have considered the 30-day delayed effective date as an integral part of the scheme to allow a dialogue between regulators and the regulated.[195] In fact, although section 553(b) specifies no minimum period for taking comments, some courts have concluded that the 30 days called for by section 553(d) are the bare minimum for allowing public input before the rules take effect.[196] They speak of the 30-day rule as being aimed at affording "interested persons an opportunity for airing their views *before* the regulation is officially adopted."[197] However, the opportunity to persuade is more often provided by the prepromulgation comment period mandated by sections 553(b) and (c).[198] As set out in the legislative history, the main purpose of the delayed effective date is to give the public an opportunity to adjust its conduct to the new rule before it carries penalties.[199]

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[189] *See, e.g.*, Kollett v. Harris, 619 F.2d 134, 145 (1st Cir. 1980); Sharon Steel Corp. v. EPA, 597 F.2d 377, 379–80 (3d Cir. 1979).

[190] Consumers Union of United States, Inc. v. Sawhill, 393 F. Supp. 639 (D.D.C.), *aff'd mem. per curiam*, 523 F.2d 1404 (Temp Emer. Ct. App. 1975). *Compare* Shimek v. DOE, 685 F.2d 1372 (Temp. Emer. Ct. App. 1981), where the court contrasted that situation with one where the regulatory problems evolved over time, and their severity became apparent only by empirical observation. Indeed, the purpose of the rulemaking was to gather information which revealed how pressing the need for the emergency rulemaking was. *Id.* at 1376–77. The court upheld the agency's decision to make the amendments effective on July 15, 1979, four days before their publication date. 44 Fed. Reg. 42,541 (1979).

[191] Kollett v. Harris, 619 F.2d 134 (1st Cir. 1980).

[192] *Id.* at 145.

[193] 92 Cong. Rec. 5650–51 (1946) (remarks of Rep. Walter).

[194] 5 U.S.C. § 553(d)(3)(1982), set out *supra* note 9.

[195] Kelly v. Department of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972).

[196] *Id.* at 1101–02.

Nonetheless, the period of delay also does provide an opportunity to offer additional input by way of a petition for reconsideration, which may convince the agency even at that stage.[200] Especially when the rule as finally adopted differs from the rule originally proposed, or when no prior comment period was afforded, the 30-day period may be a very important opportunity for the affected public to educate the agency about the likely effects of its decision.[201]

Thus, although decisions like *Kelly v. Department of Interior*[202] have been criticized as "confus[ing] the functions of sections 553(b) and (c) with that of sections 553(d) and (e),"[203] it is true that the agency may make use of the 30-day period to educate itself, particularly when no opportunity for prepromulgation comment has been provided. Citizens are also entitled to an opportunity to adjust to and comment on a new law, unless there is some reason for haste. Thus, there is good reason for the statutory requirement that agencies demonstrate why their rules must take effect immediately.

The APA scheme, which normally includes prepublication notice and comment and a delayed effective date, can be contrasted with a similar 30-day delayed effective date provision, patterned after section 553(d),[204] added to the Selective Service Act in 1971. That section[205] explicitly provides for use of the 30 days following publication in the *Federal Register* as an opportunity for any person to submit his views to the Director. This represents the only mandated opportunity for public comment, since no prepublication notice-and-comment period is required.[206] The legislative history confirms that this 30-day period was to serve two functions: the delayed effective date was to provide time for those affected to become aware of new law, and it would also provide the Selective Service System and the public the benefits of a comment period.[207] Supporters of the amendment pointed out that the short delay would be more than justified if the new procedure served to bring legal questions of authority or ambiguity to light early, when they could be easily corrected, rather than through lengthy litigation. Instead of a "good cause" exemption, the section includes a special waiver provision if the President finds and gives notice that compliance would materially impair the national defense.[208]

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[197] *Id.* at 1101 (emphasis in original).

[198] *See* United States v. Gavrilovic, 551 F.2d 1099 (8th Cir. 1977), which criticizes cases like Hotch v. United States, 212 F.2d 280 (9th Cir. 1954) and Kelly v. Department of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972), for confusing the functions of § 553(b) and (c) with § 553(d) and (e). 551 F.2d at 1104 n.9.

[199] S. Doc. No. 248 at 201, 259. The House Report continued: "Many rules *** may be made operative in less than 30 days because of inescapable or unavoidable limitations of time, because of the demonstrable urgency of the conditions they are designed to correct, and because the parties subject to them may during the usually protracted hearing and decision procedures anticipate the regulation." H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), reprinted in S. Doc. No. 248 at 260.

[200] 5 U.S.C. § 553(e)(1982), set out *supra* note 9.

[201] The Attorney General's Report recommended a deferred effective date to provide "a period . . . in which all persons interested may bring matters to the attention of agency [sic] and which will give an opportunity for changes to be made if they are warranted." Attorney General's Final Report, *supra* note 28, at 114.

[202] 339 F. Supp. 1095 (E.D. Cal. 1972).

[203] United States v. Gavrilovic, 551 F.2d 1099, 1104 n.9 (8th Cir. 1977).

[204] *See supra* note 9.

[205] [N]o regulation issued under this Act shall become effective until the expiration of thirty days following the date on which such regulation has been published in the Fed-

At least one court[209] has held this provision must be enforced, even at the cost of invalidating the on-going system of draft registration instituted by President Carter in July 1980 by presidential proclamation.[210] The President declared that his order was effective immediately, and that the initial registration period would begin three weeks later. Although the President mentioned that he was "deeply concerned about the unwarranted and vicious invasion of Afghanistan by the Soviet Union,"[211] there was no explicit waiver of the 30-day requirement. The district court in *Untied States v. Wayte* held that the indictment of Wayte for failure to register must be dismissed because the basis for the registration requirement had not been promulgated in accordance with section 463(b).

This holding was an alternative ground; the court devoted most attention to Wayte's claim that he was entitled to dismissal of his indictment because of the government's selective prosecution of only

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eral Register. After the publication of any regulation and prior to the date on which such regulation becomes effective, any person shall be given an opportunity to submit his views to the Director on such regulation, but no formal hearing shall be required on any such regulation. The requirements of the subsection may be waived by the President in the case of any regulation if he (1) determines that compliance with such requirements would materially impair the national defense, and (2) gives public notice to that effect at the time such regulation is issued. 50 U.S.C. App. § 463(b) (1976).

[206] Congress specifically exempted the Selective Service System from the Administrative Procedure Act, except its public information requirements. *Id.*

[207] *See* remarks of Senators Kennedy and McIntyre, 117 Cong. Rec. S20,485–88 (daily ed. June 17, 1971).

[208] *See supra* note 205.

[209] United States v. Wayte, 549 F. Supp. 1376 (C.D. Cal. 1982).

[210] Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980).

[211] 16 Weekly Comp. Pres. Doc. 1274 (1980).

vocal draft resisters.[212] In fact however, the court's decision on the effect of the procedural infirmity would present more serious obstacles to maintaining the draft registration system than its holding on selective prosecution. If the system itself is valid, the executive could institute a more random selection of nonregistrants for prosecution[213] and thus remove that objection to the system in practice. If the court is upheld on appeal on the invalidating effect of the procedural misstep, however, the registration requirement would presumably have to be proclaimed anew, this time with the required 30-day delay. Under the court's reasoning, any person who failed to register under the invalidly created requirement would be immune from prosecution even though the requirement was given maximum publicity and probably resulted in virtually universal actual notice to those affected. The fatal procedural flaw was not lack of notice; rather, it was cutting off a statutory right to comment.

Wayte himself could hardly complain that he had not received notice before being prosecuted, since he had obviously been aware of the draft registration requirement and had in fact taken pains to write to express his opposition.[214] Nonetheless, the effect of the abridgement of the statutory comment period deprived him of a chance to make his protest known without risking criminal penalties, and thus bears on the government's equities when it seeks to prosecute him and other vocal resisters.

In cases involving section 553(d), in contrast, courts have faced a quite different situation.[215] In some cases, the agency invokes *both* good cause exemptions, generally arguing that the circumstances justify both dispensing with notice and comment *and* an immediate or even retroactive effective date.[216] In other cases, only the effective date is at issue, since the rule in question received adequate prior notice and comment.

In cases dealing with unexpected "emergencies" or where advance notice would defeat the effect of the regulation, agencies often invoke *both* "good cause" exemptions.[217] In those instances, the general public first learns about agency policy on the same day it takes effect. In such circumstances, where the need for prompt action is clear, courts have found good cause to justify immediate effectiveness.[218] Where both exemptions are raised, if courts find that agencies lack "good cause" for eliminating notice and comment, they normally look no further. The rulemaking proceeding is then tainted and detailing further irregularities would be superfluous.[219]

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[212] Seven pages of the opinion deal with the selective prosecution question, while the procedural infirmity was handled in three.

[213] The Selective Service System has access to all Social Security records and could implement an "active" enforcement policy, identifying non-registrants and referring them to the Justice Department for a "random" selection of those to be prosecuted. *See* United States v. Wayte, 549 F. Supp. 1376, 1381 (C.D. Cal. 1982).

[214] Wayte had written two letters to the President expressing his opposition to draft registration and his intention not to register. *Id.* at 1378.

[215] In several cases involving the Department of Health and Human Services, interim regulations were applied retroactively. *See, e.g.*, Buschmann v. Schweiker, 676 F.2d 352 (9th Cir. 1982), and Kollett v. Harris, 619 F.2d 134 (1st Cir. 1980).

[216] The court in American Fed'n of Gov't Employees v. Block, 655 F.2d 1153 (D.C. Cir. 1981), explicitly recognized that both § 553(b) and § 553 (d) were at issue.

In case where ample opportunity for notice and comment has been provided, however, even when courts agree that the 30-day waiting period was improperly abbreviated by the agency, the question of an appropriate remedy seems troubling. When the only procedural error was in shortening the effective date, if the rule is otherwise substantively and procedurally proper, voiding the entire regulation seems disproportionate to any injury suffered.[220] If petitioners have lost at most only the 30 days' grace period, several courts have decided to redress that injury by enforcing the 30-day wait but holding the regulation valid thereafter.[221]

The effect of such a holding varies depending on the procedural posture of the case. If the challenge to the action is brought immediately, the court can redress the injury directly by staying the regulation until the statutory period has passed.[222] In such a case, courts should not lightly disregard the congressional decision that 30 days should normally be provided. If the case arises in an appeal from an enforcement action taken during the statutory waiting period, a finding of delayed validity would nullify the enforcement actions taken before that date.[223] In contrast, if the enforcement action was not commenced until long after the 30 days, declaring that the regulation should have taken effect 30 days later than it did makes no difference, and the procedural misstep becomes harmless error.[224]

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[217] *See, e.g.*, Reeves v. Simon, 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975); Nader v. Sawhill, 514 F.2d 1064 (Temp. Emer. Ct. App. 1975).

[218] *Id.* In both cases, the courts were able to take judicial notice of the emergency.

[219] *See, e.g.*, Tasty Baking Co. v. Cost of Living Council, 529 F.2d 1005 (Temp. Emer. Ct. App. 1975), where the court voided agency action for failure to comply with APA requirements. *But see* Kollett v. Harris, 619 F.2d 134, 145 n.15 (1st Cir. 1980), where the court took pains to note that the agency has "good cause" to make the regulations effective immediately, but not to bypass notice and comment.

[220] Rowell v. Andrus, 631 F.2d 699 (10th Cir. 1980). Some courts have voided the entire regulation, *see, e.g.*, Kelly v. Department of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972).

[221] Even the court in Kelly v. Department of Interior recognized that the agency could quickly moot the issue by repromulgating the concededly valid rule and delaying its new effective date for 30 days. 339 F. Supp. at 1102.

[222] Such action was taken in Ngou v. Schweiker, 535 F. Supp. 1214 (D.D.C. 1982).

[223] *See* United States v. Gavrilovic, 551 F.2d 1099 (8th Cir. 1977).

An OSHA case, *Daniel International Corp. v. Occupational Safety and Health Review Commission*[225] demonstrates a procedural error which was patently "harmless." The controversy centered around the effect of an accelerated effective date for regulations the corporation was found to have violated some six years after their promulgation. In 1971, the Secretary of Labor issued construction safety standards after notice and opportunity to comment,[226] but in order to take advantage of a provision allowing the newly created Occupational Safety and Health Administration to adopt federal safety standards in force on the agency's effective date without regard to the requirements of the APA,[227] the rules carried an effective date only 10 days away, one day before OSHA became effective.[228]

Daniel was inspected in the fall of 1977, and found in violation of those standards. The Fourth Circuit was not sympathetic to petitioner's procedural argument, noting that Daniel could hardly claim, six years later, that another 20 days' delay in the effective date of the regulation would have made any difference in allowing it to prepare to comply.[229] Hence, the court held the challenge to be without merit, and declined to consider whether the original acceleration was justified.[230]

One enforcement case where prejudice was clear was *United States v. Gavrilovic.*[231] On May 29, 1975, the administrator of the Drug Enforcement Administration had published for comments a proposal to add the substance mecloqualone to the list of controlled substances.[232] After receiving reports that the defendants were preparing to begin clandestine manufacture of large amounts of mecloqualone, the administrator published a final regulation adding the substance to the list of July 8, with an effective date of July 10.[233] On July 31, the defendants were arrested and charged with manufacturing a controlled substance.[234]

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[224] One court decided that such procedural errors of promulgation should not even be considered during enforcement proceedings, when procedures are provided for pre-enforcement review of standards. *See* 29 U.S.C. § 655(f) (1976), which provides that adversely affected parties may challenge the validity of an OSHA standard within 60 days of its effective date. The court went on to note that if the challenge had been timely raised, it would have had great difficulty in finding the requisite "good cause" for shortening the period of delay, since the desire to get the regulations on the books in time to allow summary adoption by OSHA would not qualify as "good cause." National Indus. Constructors v. OSHRC, 583 F.2d 1048, 1054 n.9 (8th Cir. 1978).

[225] 656 F.2d 925 (4th Cir. 1981).

[226] The procedural history is reviewed in 656 F.2d at 928.

[227] *See* 29 U.S.C. § 655(a)(1976).

[228] *See* 36 Fed. Reg. 7430 (1971).

[229] The Fourth Circuit agreed to review the procedural challenge, holding that Congress did not intend to limit procedural challenges to the pre-enforcement review procedures. 656 F.2d at 929–30, citing Marshall v. Union Oil Co., 616 F.2d 1113 (9th Cir. 1980), and Deering Milliken, Inc. v. OSHRC, 630 F.2d 1094 (5th Cir. 1980). *Contra* National Indus. Constructors v. OSHRC, 583 F.2d 1048 (8th Cir. 1978). Nonetheless, the court did think it appropriate to require some showing of prejudice from the procedural error. 656 F.2d at 931.

[230] 656 F.2d at 931.

[231] 551 F.2d 1099 (8th Cir. 1977).

In this case, activity which was previously lawful was suddenly declared unlawful. Severe criminal sanctions followed.[235] The administrator had justified the early effective date by claiming immediate control was necessary to protect public health and safety.[236] This position was weakened by the administrator's action in specifying an early effective date for only one of two drugs posing about the same threat to the public health.[237] The inference was inescapable that it was the threat posed by defendants' operation which triggered the change in the law. That justification was not "good cause" since the administrator could have enjoined defendants' operation immediately because they were not registered as a drug manufacturer.[238] To subject defendants instead to a felony conviction offended notions of fair play and due process,[239] and the court agreed that under these circumstances, there was no public necessity for waiving the statutory waiting period. Thus, defendants' activities were not in violation of law, and their convictions were vacated.[240]

In *British American Commodity Options Corp. v. Bagley*,[241] by contrast, a group of commodity options dealers and their national association raised the procedural issue before the challenged regulations went into effect. The Commodity Futures Trading Commission, granted authority to regulate that industry in 1974,[242] announced in the *Federal Register* in October 1975 that it was considering rules to regulate or prohibit all options trading, and solicited comments on several alternative approaches, as well as suggestions of temporary rules.[243]

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[232] Proposed Placement of Mecloqualone and the Thiophene Analog of Phencyclidine in Schedule I, 40 Fed. Reg. 23,306 (1975).

[233] 40 Fed. Reg. 28,611 (1975).

[234] 551 F.2d at 1103.

[235] Violation of 21 U.S.C. § 841(a)(1) (1976) carries a prison term or fine.

[236] 40 Fed. Reg. 28,611–12(1975).

[237] 551 F.2d at 1102.

[238] *Id.* at 1106. The court also noted that the government did not attempt to shut down the operation until 21 days after the effective date. *Id.*

[239] The court noted the harshness of subjecting defendants to a felony conviction when other means existed. *Id.*

[240] *Id.*

[241] 552 F.2d 482 (2d Cir.), *cert. denied*, 434 U.S. 938 (1977).

[242] Commodity Exchange Act, 7 U.S.C. §§ 1–22 (1976).

[243] 40 Fed. Reg. 49,360–62 (1975).

On February 20, 1976, the commission published its proposed temporary rules.[244] A requirement for the dealer to "segregate," or set aside a portion of the customer's cash payment until the option is sold or exercised, was not part of this proposal, but the commission solicited comments on the wisdom of such a requirement.[245] An oral hearing was held in March 1976, and some written comments supporting a segregation requirement were received.[246] The report of an advisory committee appointed to make its recommendations also advocated the requirement.[247]

On October 8, 1976, proposed interim regulations, including a "segregation" requirement, were published, intended to become effective on November 22.[248] Comments were solicited until November 8.[249] On November 24, the Commission published the final rules as adopted, delaying effectiveness for 15 days for most of the rules, but allowing 30 days before the segregation requirement became effective.[250]

Because the rules affected a small, cohesive group which followed the proceedings very closely, plaintiffs in this case had ample warning and opportunity to participate, as well as adequate opportunity to be in full compliance by the effective date.[251] To the court, the public interest in achieving comprehensive regulation of an area historically "fraught with abuses" argued for adopting the rules without further delay.[252] The court noted that the segregation requirement, the main target of complaint, was delayed the full 30 days.[253]

The court seemed convinced that these plaintiffs' long and active involvement in the rulemaking process demonstrated that they did not need any more time to debate the wisdom of the rules. Given that the fact of regulation and its imminence had been apparent since Congress first created the commission, the complaint by these parties that they needed more time to get ready to comply was not very persuasive.[254] However, the court accepted with almost no scrutiny the agency's claim that after over a year of consideration and study, the regulations were so urgent that another two weeks' advance notice simply could not be provided. The burden was placed on the challengers to demonstrate prejudice, often difficult to do, and the court upheld the agency without much discussion.[255]

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[244] 41 Fed. Reg. 7774 (1976).

[245] 41 Fed. Reg. 7776 (1976).

[246] 552 F.2d at 487.

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] 41 Fed. Reg. 51,808 (1976).

[251] The House Report suggested that such a situation might be a reason to dispense with the 30-day wait. See *supra* note 199.

[252] 552 F.2d at 489.

[253] *Id.*

[254] *See supra* note 251.

One preenforcement case where the court did devote scrutiny to the agency's justification for an early effective date was *Nance v. Environmental Protection Agency.*[256] At issue was agency action giving final approval to a request by an Indian tribe to upgrade its reservation from Class II to Class I air quality.[257] The effect of this action would greatly restrict the possibility of development of the land.

The proceedings had dragged on since May 1976, and had included public hearings and compilation of a report by the tribe, which submitted its formal request on March 7, 1977.[258] EPA was under an obligation to act on the request within 90 days.[259] It published notice of its intent to approve the request on April 29, and accepted comments through June 30, although the 90-day period expired on June 7.

In the interim, Congress passed the Clean Air Amendments.[260] If the redesignation were not approved and made effective before the effective date of the amendments, the tribe would have to begin the whole lengthy redesignation procedure again. Under the circumstances, EPA approved the request on August 5, effective immediately, two days before the amendments took effect.[261]

In reviewing this decision, the court did balance the agency's justification, which centered on the unfairness to the tribe if the effective date had been delayed, against the lack of prejudice to other affected interests, who had had ample warning that the change would likely take place, effective upon approval.[262] This balancing seems more in keeping with Congress' admonition that agencies follow the procedures set out unless there is "good cause" not to,[263] rather than placing the burden on the public to demonstrate "good cause" to wait 30 days.[264] Of course, if no person can demonstrate prejudice, the agency may argue that any further delay would be "unnecessary,"[265] but by specifying a waiting period to be observed unless there was "good cause," Congress seemed to have had in mind requiring more than this from government authorities.[266] This was not a situation where the agency was granting an exemption or relieving a restriction, actions which Congress had decided need not be delayed.[267] No finding of "good cause" is required in those situations because those directly affected need no time to adjust to less onerous regulations and are sure to welcome the new state of affairs as soon as possible.[268] In other instances, Congress decreed the advance notice, and courts should demand to know why it cannot be given.[269]

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[255] 552 F.2d at 489. The case was especially weak since challengers did receive the full 30 days to comply with the "segregation" requirement.

[256] 645 F.2d 701 (9th Cir. 1981).

[257] Procedures for redesignation by an Indian Tribe governing body were set out in 40 C.F.R. § 52.21(c) (1975).

[258] 645 F.2d at 704–05.

[259] EPA regulations required action on such a proposal within 90 days. 40 C.F.R. § 52.21(c)(3)(vi) (1975).

[260] The history of the 1977 Clean Air Act Amendments is set out in 645 F.2d at 706–07.

[261] *Id.* at 707.

[262] *Id.* at 709.

[263] *See* S. Doc. No. 248 at 200, 258.

[264] The three judge court in Kelly v. Department of Interior expressly rejected any such suggestion that it is up to the public to show that an effective date should be delayed. *See* 339 F. Supp. 1095 at 1101 (E.D. Cal. 1972).

The most difficult decision was posed by the preenforcement challenge in *Ngou v. Schweiker.*[270] There a stay could have delayed the effective date, but at large cost to legitimate governmental interests.[271] The Secretary of Health and Human Services was faced with uncertainty about whether Congress would fully fund the Refugee Resettlement Program,[272] under which the federal government reimburses states for the costs of cash and medical assistance provided to needy refugees. The program was funded under a continuing resolution which expired on March 31, 1982. Since it was uncertain whether any other money would be available thereafter, the secretary faced a shortfall of $14.8 million per month from April to October 1982 unless benefit levels were changed.[273]

The secretary attempted to plan for an orderly phasing out of the program rather than allow it to simply run out of money. On December 11, 1981, he proposed for public comment amendments to the Refugee Resettlement Program regulations, which would cut from 36 to 18 months the period during which the federal government would reimburse cash and medical benefits for refugees.[274] The secretary reasoned that need would be greatest for those who had most recently arrived, while an 18-month period would allow for adjustment and establishment of a means of self-support thereafter. For the second 18 months of a refugee's residence in the United States, the federal government would fund only that support given pursuant to state programs to provide general assistance benefits in each state.[275]

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[265] *See* legislative history cited *supra* note 199. The qualifying language of § 553(b) is absent from § 553(d)(3).

[266] The agency must make and publish a finding of "good cause" with the rule. 5 U.S.C. § 553(d)(3)(1982).

[267] *Id.* § 553(d)(2).

[268] *See* Attorney General's Manual at 37.

[269] In discussing the bill, Congressman Walter remarked that "[t]his section places the burden upon administrative agencies to justify in law and fact the issuance of any rule effective in less than 30 days." (remarks reprinted in S. Doc. No. 248 at 359).

[270] 535 F. Supp. 1214 (D.D.C. 1982).

[271] The stay cost $2 million in funds scheduled to be cut off. *Id.* at 1217.

[272] *See* Refugee Act of 1980, 8 U.S.C. §§ 1521–1525 (1982).

[273] Ngou v. Schweiker, No. 82–0865, slip op. at 2 (D.D.C. Apr. 30, 1982).

[274] *Id.*

After accepting comments, the secretary approved the regulation on February 8, 1982.[276] Because of the delays required to obtain clearance from the Office of Management and Budget, however, the regulation did not appear in the *Federal Register* until March 12, 1982.[277] The program operates on a monthly basis, and planning is done quarterly; both a new month and a new quarter began April 1. Thus, if the secretary had allowed 30 days before the changes became effective, he would in effect have delayed the changes not to April 12 but May 1, and possibly to July 1.[278] Therefore, under the circumstances, the secretary announced that the regulations would take effect on April 1.

These changes would have had an especially devastating impact on about 10,000 refugees located in the state of Washington, where many Asian refugees had settled. Washington had no general assistance program, which meant the refugees who had been in the United States more than 18 but less than 36 months would simply be cut off. Chances of finding work were slim given the state's high unemployment and the lack of transferable skills the often illiterate refugees brought to this country.[279]

Attorneys representing these refugees brought suit seeking to enjoin inplementation of the regulation. The only procedural misstep was the shortened delayed effective date, which the secretary urged was justified by "good cause."[280] He pointed to the fact that each month's delay would cost approximately $15 million, which would decrease the amount available for other refugee assistance purposes.[281]

The complaint was filed on March 29, 1982. Because of the urgency of the matter, the court held a hearing on a motion for preliminary injunction on March 30, and on March 31, issued an order enjoining enforcement for 30 days only as it related to refugees living in the state of Washington.[282] Since the new program could go into effect elsewhere, the additonal amount the government was required to expend was reduced to $2 million.[283] The court recognized that this might reduce the benefits available to other refugees, but nonetheless held that since the secretary had approved the regulation on Feburary 8, 1982, he had "had ample time to provide these desperate refugees with the 30-day lead time provided in the statute which would enable them better to adjust to their changed circumstances."[284] Judge Gesell did not elaborate as to how another 10 days would have made any difference, or as to why refugees in other states could manage with only 20 days' warning. He merely enforced a 30-day waiting period from the date of his order, thus sustaining benefits for another month.[285]

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[275] 47 Fed. Reg. 10,845 (1982).

[276] 535 F. Supp. at 1216.

[277] Interview with Beverly Dennis III, Office of General Counsel of HHS, (June 16, 1982).

[278] *Id.*

[279] Ngou v. Schweiker, No. 82–0865, slip op. at 2 (D.D.C. Apr. 30, 1982).

[280] 535 F. Supp. at 1216.

[281] *Id.*

[282] *Id.* at 1217.

In this case, the court weighed the special needs of the 10,000 refugees who would be left without any means of subsistence against the justification advanced by the agency, which could have acted sooner. Of course, the refugees had been on notice that the program on which they depended would be funded only until March 31,[286] and had notice as early as December 11, 1981, that their benefits might well be terminated.[287] Nevertheless, in balancing the impact on them against the government's reasons for an early effective date, the court held they were entitled to a full month's notice, despite budgetary constraints.

IV. THE SPECIAL CASE OF WELFARE BENEFITS

As the preceding discussion illustrates, some of the most difficult "good cause" cases have involved rules which govern mass welfare programs. In an age of economic belt tightening, both Congress[288] and administrative agencies have taken steps to reduce benefits,[289] often without pausing for procedural niceties. In two recent cases,[290] courts have considered whether pressing financial strictures justified taking measures without observing the pattern of prior notice, opportunity to comment, and delayed effective date.

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[283] *Id.*

[284] *Id.* at 1216.

[285] *Id.* at 1217. On April 30, the court held that the Secretary's decision was substantively valid but noted that he was considering an application from Washington State for special relief. Ngou v. Schweiker, No. 82–0865 (D.D.C. Apr. 30, 1982).

[286] The program was funded under a continuing resolution which expired March 31, 1982. 535 F. Supp. at 1216 n.2.

[287] *Id.* at 1215.

[288] The Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97–35, 95 Stat. 357, mandated deep cuts in benefits programs.

[289] The agencies have in general reacted to congressional directions, adjusting regulations for administrative convenience and equity. For example, HHS issued regulations to treat Supplemental Security Income beneficiaries living in their own households but receiving support from friends and relatives in the form of reduced rent more on a par with those receiving such support in a relative's home. That adjustment in regulations has been considered by several courts, and upheld as substantively correct. *See, e.g.*, Antonioli v. Harris, 624 F.2d 78 (9th Cir. 1980); Kimmes v. Harris, 647 F.2d 1028 (10th

In this context, however, the basis for legal challenge to the abbreviated rulemaking procedures is not the APA. In 1946, Congress exempted from section 553 any "matter relating to . . . benefits."[291] As government benefits evolved from largesse to entitlement, and affected large numbers of Americans, the congressional decision to afford no public participation in often far-reaching decisions was severely criticized.[292] The Administrative Conference recommended that these statutory exemptions be removed,[293] and urged agencies to voluntarily utilize notice and comment in their rulemaking. In response, the Department of Health, Education, and Welfare, predecessor to the current Department of Health and Human Services, determined as a matter of policy to employ notice-and-comment procedures with a "good cause" exemption when making rules.[294] Hence, challengers complained that the agency had failed to follow its own procedures, not requirements mandated by Congress.

Aside from the voluntary nature of the rulemaking requirements, these cases illustrate the very special character of the rules governing mass benefit programs. First, in a mass welfare system administered by a far-flung and decentralized bureaucracy, rules are essential to ensure that the thousands of decisions in individual cases are made consistently and in accordance with law.[295] Invalidation of rules invites administrative chaos. Second, some programs are federally funded but state administered,[296] making the federal regulations crucial to the states,

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Cir. 1981); *contra* Jackson v. Schweiker, No. 81–1391 (7th Cir. July 20, 1982). Interim regulations were held to have been procedurally defective in Buschmann v. Schweiker, 676 F.2d 352 (9th Cir. 1982).

[290] Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877 (3d Cir. 1982); Buschmann v. Schweiker, 676 F.2d 352 (9th Cir. 1982).

[291] 5 U.S.C. § 553(a)(2)(1982).

[292] *See* Bonfield, *Public Participation, supra* note 14; Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CALIF. L. REV. 886 (1975).

[293] 1 C.F.R. § 305.69–8 (1983).

[294] 36 Fed. Reg. 2532 (1971). On June 22, 1982, the Secretary issued for comment a proposed rule which would reaffirm the Department's policy ordinarily to use notice-and-comment procedures, but to make clear that omission of these procedures is a matter for the Department's judgment, not the "good cause" standard, and that the policy is not intended to create any judicially enforceable rights. *See* 47 Fed. Reg. 26,860 (1982).

[295] *See* Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

[296] One familiar example is Aid to Families with Dependent Children, codified at 42 U.S.C. §§ 601–676 (1976 & Supp. V 1981).

which need assurance that their programs comply with federal law and will therefore receive federal funds. Third, these rules have an immediate and direct impact on the monthly checks received by millions of Americans. Because of the number of people involved, changes in benefit levels represent large amounts of money in the aggregate. Thus, if benefits must be recomputed because of procedural error, the result can be extremely costly to the government.[297]

Two recent cases illustrate the special problems inherent in rulemaking for benefit programs. *Buschmann v. Schweiker*[298] was a challenge to an "interim" rule promulgated on October 20, 1975,[299] and made retroactive to December 1974. The rule in question imputed as income to individuals any support they received from friends or relatives in the form of free or reduced rent for living accommodations.[300] Buschmann paid $80 rent to live in a house owned by his son, but the fair market rental value of the house was determined to be $145 per month. Under the new regulation, the secretary determined this arrangement generated $65 per month of unearned income to Buschmann, thus making him ineligible for Supplemental Security Income.

The "interim" regulation was promulgated without notice or comment, and given retroactive effect. After full notice and comment, the identical regulation was promulgated as a final rule on July 7, 1978.[301] Buschmann's challenge was aimed at the substance of the regulation as well as the procedure by which it was promulgated.

The secretary's reason for promulgating the "interim" regulation in summary fashion was that it implemented legislation which took effect on January 1, 1974. Hence, the secretary argued that the need to administer an on-going program made it necessary to get "interim" rules in place with dispatch.

The Ninth Circuit noted that after almost two years had elapsed, there was no "emergency" that justified dispensing with the notice-and-comment procedures in this case.[302] Thus, although the final rule was determined to be valid,[303] the interim rule was invalidated for procedural error, and benefits ordered recomputed for the time it had been applied.

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[297] For instance, the extra month's extension at issue in Ngou v. Schweiker involved close to $15 million. *See supra* text accompanying notes 270–287.

[298] 676 F.2d 352 (9th Cir. 1982).

[299] 40 Fed. Reg. 48,937 (1975).

[300] The rule was codified as 20 C.F.R. § 416.1125(d) (1982).

[301] 43 Fed. Reg. 29,277 (1978).

[302] 676 F.2d at 357.

[303] The validity of the regulation was upheld in Antonioli v. Harris, 624 F.2d 78 (9th Cir. 1980).

A closer case was presented in *Philadelphia Citizens in Action v. Schweiker*.[304] There, Congress had enacted major legislation, the Omnibus Budget Reconciliation Act of 1981 (OBRA),[305] which was given highest political priority and designed to cut back on federal spending One program targeted for cuts was Aid to Families with Dependen Children.[306] This program is administered by the states, which receive federal reimbursement for payments made in conformance with federal law.[307] This double layer of bureaucracy put pressure on HHS to provide reliable guidelines for the states to use in altering their own regulations to conform to the new law.

A protracted political battle in the legislature delayed final passage of OBRA until August 13, 1981. In an effort to realize the cost savings as soon as possible, the legislation carried an effective date of October 1, 1981, only 49 days later.

HHS had determined in May 1981 that it would face time pressures to issue implementing regulations, and decided to use informal means of gathering public input without holding a formal notice-and-comment period.[308] The regulations promulgated on September 21, 1981, were accompanied by the secretary's finding that congressional concern with reducing government spending immediately and the short time Congress provided for implementation made use of the APA procedures "impracticable" and "not in the public interest."[309] The regulations were published as "interim rules," not merely proposed rules, to give the states some confidence that federal law would not be abruptly changed in "midstream."[310] Nonetheless, the agency did solicit comments and advice until November 20, 1981, thus providing a 60-day period for comment before promulgating the rules in final form.[311]

The rules in question in large part restated the changes made by the legislation. However, some relatively minor matters had been left to the Secretary's discretion. The Secretary argued that the states needed guidance on those matters to be able to comply with federal law.[312] Some such matters, such as defining a full-time student, determining whose income would be disregarded, or fixing the amount of equity interest in an automobile which would be disregarded in computing a family's resources, were of direct concern to recipients.[313]

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[304] 669 F.2d 877 (3d Cir. 1982).

[305] Pub. L. No. 97–35, 95 Stat. 357 (1981).

[306] 42 U.S.C. §§ 601–676 (1976 & Supp. V 1981).

[307] States which comply can obtain reimbursement for more than half of the benefits paid and administrative expenses incurred. *Id.* § 603.

[308] A study group was created in May to formulate plans for drafting new rules. In two mailings in July, HHS sent out requests for comments and ideas to individuals and organizations. Representatives of HHS met twice with representatives of the American Public Welfare Association (APWA) and sent a rough draft to the states through APWA on August 13. HHS also held conferences for state administrators in mid-September. 669 F.2d at 880.

[309] 46 Fed. Reg. 46,570 (1981).

[310] *Id.*

[311] *Id.*

Challenges to the new rules were brought in Ohio[314] and Pennsylvania. In Pennsylvania, Chief Judge Lord invalidated the HHS regulations for failure to provide for notice and comment.[315] Judge Lord noted the effects of the changes on AFDC recipients in Pennsylvania alone: some 53,520 persons in 17,840 households would become ineligible for any benefits and an additional 23,950 households composed of 57,050 individuals would face reductions of their monthly checks. The effect on the state treasury was also substantial: some $5.2 million per month if the changes were not implemented on time.[316]

Despite this substantial impact and the short time available, Judge Lord followed Third Circuit precedent[317] and rejected a short deadline as reason to omit a notice-and-comment period. Instead, he held the secretary had not demonstrated that compliance with the APA was "impracticable." He noted that HHS had been engaged in polishing draft regulations from August 13 to September 21, and found that soliciting public comment on them would not have added appreciably to the length of the process. To give petitioners a meaningful opportunity to comment, he issued a declaratory judgment holding the interim rules invalid and permanently enjoined the state from implementing its regulations developed in reliance on the federal rules.[318] The court thus enjoined the state from implementing the AFDC cutbacks mandated by Congress because of procedural errors in promulgating the rules in question.[319]

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[312] The Third Circuit majority agreed. 669 F.2d at 884.

[313] A section-by-section analysis of the regulations appears in the District Court opinion as Appendix A. Philadelphia Citizens in Action v. Schweiker, 527 F. Supp. 182, 196–206 (E.D. Pa. 1981).

[314] The rules were upheld in Ohio State Consumer Educ. Ass'n v. Schweiker, 541 F. Supp. 915 (S.D. Ohio 1982). Also upheld against a similar challenge were Medicaid regulations to conform to OBRA in Coalition of Mich. Nursing Homes, Inc. v. Dempsey, 537 F. Supp. 451 (E.D. Mich. 1982). Both courts noted that the Sixth Circuit had upheld EPA's claim of "good cause" in the nonattainment rule controversy, thus signalling a more deferential attitude toward administrative judgment on "good cause" than was exhibited by most other circuits. *See* Republic Steel Corp. v. Costle, 621 F.2d 797 (6th Cir. 1980), and *supra* note 86.

[315] Philadelphia Citizens in Action v. Schweiker, 527 F. Supp. 182 (E.D. Pa. 1981).

[316] *Id.* at 186–87.

[317] American Iron & Steel Inst. v. EPA, 568 F.2d 284 (3d Cir. 1977); Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979).

[318] *See* 527 F. Supp. at 191–95.

Over the strong dissent of Judge Higginbotham, the Third Circuit reversed and held the secretary in this situation had "good cause" to proceed as he had.[320] The urgency attached to achieving the budget cuts was clear, and the regulations were held necessary for administration of the program. The court noted that the pain of the cutbacks was not attributable to the actions of the secretary; he had been left no discretion on such matters, since those decisions had been made in the Congress.[321]

The court distinguished recent Third Circuit precedent holding that EPA had erred in asserting "good cause" in implementing the Clean Air Act.[322] The majority suggested several times[323] that the concern of the challengers was to halt or delay the reduction in benefits, a decision which was not the secretary's to make. Rather, it was required by OBRA, a fully debated act of Congress. The court distinguished the Clean Air cases, where the deadlines in a fully debated act of Congress were *not* "good cause" for similar procedures, by pointing out that the deadlines there were "substantially more distant."[324] However, in one EPA case, Congress had called for action to be completed in 60 days, a period only 11 days longer than in the case at bar.[325]

The court further distinguished the EPA cases by noting that Congress had exempted rules regarding benefits from notice and comment.[326] In considering EPA's claim of "good cause," the Third Circuit had given weight to the absence of any statutory language in the Clean Air Act dispensing with APA requirements.[327] Since Congress had not subjected HHS to the same requirements, its silence on procedures would not indicate that the requirements were meant to apply. Congressional silence on procedure should not be dispositive even when an agency is subject to the APA, however. It is a matter for interpretation whether Congress' desire for speedy implementation overrides its intention that rules receive public comment, since the APA procedures contain the "good cause" exemption.[328]

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[319] "The [state] stands to lose $2.5 or $5 million dollars per month as a result of [this] holding." *Id.* at 194.

[320] Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877 (3d Cir. 1982).

[321] *Id.* at 888.

[322] *See* cases cited *supra* note 317.

[323] 669 F.2d at 880 n.1, 886, and 888.

[324] *Id.* at 885 n.8.

[325] The court noted that the states were given more than a year to complete and implement plans under the Clean Air Act. *Id.* at 883. However, Congress gave EPA only 60 days to review state-proposed designations, the action challenged in Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979).

[326] 5 U.S.C. § 553(a)(2)(1982), discussed in 669 F.2d at 885.

[327] Sharon Steel Corp. v. EPA, 597 F.2d 377, 380 (3d Cir. 1979).

Despite the protest of Judge Higginbotham that 110,570 poor people have as much right to procedural protection as the steel companies did in the *Sharon Steel* case,[329] the Third Circuit majority held that the secretary had acted reasonably and in good faith to fulfill his statutory duty to give reliable guidance to the states. The majority even questioned whether the interest of benefit recipients in the rules was sufficient to confer standing,[330] again viewing their real quarrel as being with the benefit reductions ordered by Congress. The dissent's response was, of course, accurate: the interest which petitioners asserted is their interest in their right to comment on the rules.[331] Whether or not that comment influences the benefit cuts, their right was violated if the secretary lacked "good cause" to forego notice and comment, thus furnishing ample "injury in fact."

The court's endorsement of the secretary's actions seemed to rest on its view that notice and comment in this instance would have been essentially useless. It was apparent to the court that the views of the petitioners and others would be well known to the secretary: welfare recipients would want him to be as generous as possible, while those interested in cutting government spending would seek more restrictive guidelines. After the major battle which had just taken place in the Congress between the two views, another opportunity to ventilate the two positions would produce no useful information whatsoever. Instead, it might delay implementation of a major piece of legislation considered urgent by elected officials.

This rationale undervalues the importance to petitioners of being assured access to the federal decisionmaker, even if in most cases, the secretary was as generous as the statute allowed him to be.[332] It denies to the people most directly affected by the secretary's choices the chance to influence decisions of critical importance to them. Even if their participation would predictably have little effect on the final outcome, other courts have placed more value on it than in this case, especially when the courts are convinced that recognition of that interest could have been accommodated at very little additional cost to the agency.[333]

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[328] 5 U.S.C. § 553(b)(B)(1982) was designed to allow agencies to dispense with public participation where circumstances warranted.

[329] 669 F.2d at 893 (Higginbotham, J., dissenting).

[330] *Id.* at 880 n.1. The District Court for the Eastern District of Louisiana took the hint and held that a mere interest in one's statutory right to comment was insufficient to confer standing. Wells v. Schweiker, 536 F. Supp. 1314, 1320–21 (1982).

[331] 669 F.2d at 889 n.1 (Higginbotham, J., dissenting).

[332] *See* Philadelphia Citizens in Action v. Schweiker, Appendix A, 527 F. Supp. 182, 196, (E.D. Pa. 1981).

The balancing exercise in which courts must engage in evaluating an agency claim of "good cause" to omit notice and comment may usefully be compared with the due process calculus set out by the Supreme Court in *Mathews v. Eldridge*,[334] another case involving welfare recipients. Although the notice-and-comment procedures are normally considered of statutory, not constitutional, dimension,[335] in both types of cases courts explicitly weigh the burden on government operations against the benefit of additional procedures.

In *Mathews*, the Court was called upon to decide whether the constitution requires an evidentiary hearing prior to termination of social security disability benefits. To answer such a question, a court must first weigh "the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[336]

Noteworthy among the *Mathews* factors is the Supreme Court's express recognition of the goal of "accurate" or "correct" decision-making as the end of the procedures used. Thus, the benefit to be derived from more or different procedures must be some incremental improvement in the accuracy of the decision-making process.

In contrast, in good cause cases, this question seems irrelevant. Many courts have not required any showing that more procedures than those afforded would make any contribution whatever to the accurate or correct resolution of the question facing the agency. Courts rarely point to any input the challenger would have provided had he been given his opportunity. Rather, the issue seems to be framed exclusively in terms of whether the agency had sufficient justification for not providing more opportunity to comment. Of course, the courts can and do point to the clear congressional command to provide the section 553 procedures with only narrow exemptions. Since Congress believed the process in general to be beneficial when rules are being formulated, courts may defer to that general judgment rather than inquire into the utility of the procedures in each specific case. Yet, Congress did invite the agencies to dispense with the procedure if conditions warrant, and the courts are faced with the considered judgment of an arm of the executive branch that congressional purposes will be frustrated if the procedures are used. Therefore, it is somewhat surprising that so little attention is devoted to whether any additional benefit, in terms of more accurate or better decisionmaking, will be gained from additional procedures.

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[333] *See, e.g.*, cases cited *supra* note 86.

[334] 424 U.S. 319 (1976).

[335] *But see* Curlott v. Hampton, 438 F. Supp. 505 (D. Alaska 1977), which applied the *Mathews* test and held as a matter of *due process* that an opportunity to submit written comments was required. *Id.* at 509 n.2. The case is characterized as "very provocative" by Professor Davis. 1 Davis, *supra* note 14 at 598. *See also* Sinaiko, *supra* note 292.

[336] 424 U.S. at 335.

Sometimes the connection is obvious. A case such as *Standard Oil Co. v. Department of Energy*[337] represents a situation where agency decisionmaking was patently ill-informed. In attempting to regulate petroleum prices, the Federal Energy Administration issued regulations on February 1, 1976, specifying how refiners could "pass through" certain increased costs.[338] The agency took the position that the regulation entailed no change in the regulatory framework, and merely made explicit what had been implicit in the regulations previously in effect. Therefore, no notice or comment was provided.

The rule was greeted by "a storm of protest,"[339] causing the agency to issue a notice of proposed rulemaking and schedule a public hearing. As a result of the information gathered, on April 6, 1976, the FEA repealed the rule in question retroactively to February 1, 1976, concluding that the rule would have caused the following undesirable effects: "(1) inflation; . . . (3) 'a disincentive for refineries to build up inventories', (4) an incentive to 'decrease refinery production', and (5) reconsideration, deferment, or even elimination of 'capital investment to expand refinery capacity.' "[340]

In this case, the error was clear and palpable. Even the agency admitted that the rule as promulgated was substantively deficient, and the deficiencies were clearly related to incorrect and incomplete information. Had the agency taken the time to solicit the views of the industry beforehand, a different, less calamitous rule would have been issued. Furthermore, the agency was constrained not only by the APA, but also by the Federal Energy Administration Act,[341] in which special procedural safeguards were included to guard against hasty and uninformed agency action. Where the educational process intended by Congress had so clearly failed, the court had little difficulty in voiding retroactive application of the rule for the period from January 1, 1975, to January 31, 1976.[342]

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[337] 596 F.2d 1029 (Temp Emer. Ct. App. 1978).

[338] 41 Fed. Reg. 5111, 5113, 5120 (1976).

[339] 596 F.2d at 1060.

[340] 41 Fed. Reg. 15,330, 15,331 (1976), quoted in 596 F.2d at 1038.

[341] Section 7(i)(1)(B) and (C) of the Federal Energy Administration Act of 1974, 15 U.S.C. § 766(i)(1)(B) and (C), was applicable to the Federal Energy Agency at the time. The section was repealed in 1977 by the Department of Energy Organization Act. 596 F.2d at 1058.

Another case where the court was confident that public comment would most likely have improved the final rule is *Mobay Chemical Corp. v. Gorsuch*.[343] The Federal Insecticide, Fungicide, and Rodenticide Act charges the Environmental Protection Agency with controlling and limiting environmental damage from pesticides.[344] To carry out this assignment EPA registers and licenses for sale only those pesticides whose use can be demonstrated not to harm the environment. Much test data are required in support of an application. Such data represent a substantial investment by applicants, and are considered proprietary information held as trade secrets by them.

In an effort to speed up the application and registration process, Congress in 1978 ended trade secret protection for test results,[345] and instituted a system of forced sharing of information. The legislation offered a 10-year period of exclusive use for information about new chemicals contained in pesticides registered after September 30, 1978. The EPA was authorized to use any nonexclusive use data submitted after December 31, 1969, in support of another application, with the requirement that the later applicant pay compensation to the original submitter. If the parties could not agree upon amount, either side might initiate binding arbitration proceedings.[346]

Constitutional challenges to the legislation as a "taking" of valuable property were joined with attacks on the regulations promulgated by EPA to implement the statute. Concerning the rule in question, the agency decided that each applicant must "cite all," relying not only on his own data but using any pertinent information in EPA's files and paying compensation to each prior submitter.[347] Mobay and others contended that such an interpretation of the statute flew in the face of congressional language giving an applicant a choice of whether to use his own data or instead to rely on data already in the public domain or in EPA's files.[348]

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[342] *See also* Shell Oil Co. v. FEA, 574 F.2d 512, 516 (Temp. Emer. Ct. App. 1978).

[343] 682 F.2d 419 (3rd Cir.), *cert. denied,* 103 S. Ct. 343 (1982).

[344] 7 U.S.C. § 136a (1982).

[345] Pub. L. No. 95–396, 92 Stat. 819 (1978).

[346] 7 U.S.C. § 136a(c)(1)(D)(1982).

[347] 40 C.F.R. § 162.9–4, –5(1983).

[348] U.S.C. § 136a(c)(1)(D)(1982).

Mobay also complained that the regulations were procedurally defective since they were not subjected to full notice-and-comment procedures, and were made effective immediately.[349] The EPA had determined that a full round of notice and comment would be "contrary to the public interest" because of the compelling need to resume the pesticide registration process as quickly as possible.[350] On review, the Third Circuit rejected the constitutional challenge, and found it unnecessary to address the question of whether the agency had properly interpreted the statute, relying instead on the failure to use proper procedures. The court noted the agency's apparent confusion about what the statute required, and admonished it that its failure to observe the notice-and-comment procedures "is directly responsible for many of the problems caused by the regulations." Had the agency taken the time to educate itself about the statute, the court observed that its "difficult task would have been facilitated."[351]

In *Buschmann v. Schweiker*,[352] in contrast, the connection between the notice-and-comment procedure and a different outcome was not obvious. There, the only complaint could be to the procedures used in issuing the interim rules, since the final identical twin was upheld as being substantively valid and procedurally impeccable.[353] Since after full notice and comment the rule remained unchanged, there was strong evidence that prior notice and comment in and of itself would not have made any difference. Nonetheless, the court refused to overlook the procedural misstep as "harmless error," and invalidated the interim rule.[354] Since the improperly promulgated rule had resulted in a loss of social security benefits to the petitioner and the class he represented, this decision meant that they would receive the additional amounts for the three and one-half years during which the invalidated regulation had been applied.

Refusing to consider the procedural lapse harmless error, the court noted that procedural protections are just as important to social security recipients as they are to powerful corporations.[355] Indeed, they may be more important.

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[349] The procedural history is set out in 682 F.2d at 425.

[350] 44 Fed. Reg. 27,952, 27,945 (1979).

[351] 682 F.2d at 426–27.

[352] 676 F.2d 352 (9th Cir. 1982).

[353] *Id.* at 358.

[354] The Secretary urged that the procedural misstep was "harmless error," and the lower court held that the defect was not prejudicial. *See* 5 U.S.C. § 706(1982), which provides that the court must take "due account" of the rule of "prejudicial error" in reviewing agency actions. The majority in Buschmann v. Schweiker was not convinced that the failure to afford prior notice and comment "clearly had no bearing on . . . the substance of decision reached," citing Braniff Airways v. CAB, 379 F.2d 453, 466 (D.C. Cir. 1967), and refused to hold the error "harmless." 676 F.2d at 358. *See infra* text accompanying note 368.

The difference between administrative rulemaking and the decision at issue in *Mathews v. Eldridge*[356] shows that judges are correct to enforce the APA procedures without regard to whether using them would likely produce a more "correct" decision. There are great differences between the agency decision reviewed in *Mathews* and the one at issue in *Buschmann*. In *Mathews*, the task is to determine the facts, existing or historical (is this person still disabled?) and then apply the law, the essence of adjudication.[357] In contrast, an agency promulgating rules of general applicability is engaged in a quite different effort. In exercising the law-making power delegated to it by Congress, it is trying to determine "legislative" facts,[358] which are often more political judgments rather than a reconstruction of historical events.

In making such judgments, the information which any one participant might provide would often be redundant, but the fact that he and others register an opinion or preference would nonetheless be very important data in the intensely political process of hammering out rules. Richard B. Stewart has identified an important function of American administrative law: courts now insist on "provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision."[359] In carrying out this function, courts should be most zealous in guarding access to the process for those with the most to lose but the smallest ability to assert their interests.

In rulemaking with respect to mass benefit programs, large numbers of citizens are vitally concerned about how the administrator exercises the discretion Congress gives him. They are often among society's least advantaged, however, so that effective participation in any procedures government provides is especially difficult for them.[360] Courts viewing this group as a "discrete and insular minority"[361] may think it appropriate to insist on extra effort to seek out their views when their most basic interests are at stake. Because of their inability to influence the normal political process, moreover, they may need extra protection from the impatience of the majority. In this particular case, the interim rule in question was promulgated some 22 months after the statutory change which triggered reexamination of this area and was given retroactive effect. It is difficult to see why notice and comment could not have been solicited while this change in policy was being considered by the agency, thus giving our poorest citizens at least a chance to avoid a reduction of the benefits on which they depend.

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[355] 676 F.2d at 357.

[356] 424 U.S. 319 (1976).

[357] The APA draws a "bright line" between two types of administrative activities, rulemaking (5 U.S.C. § 551(5)) or adjudication (5 U.S.C. § 551(7)). Commentators question whether the line is really so bright. *See* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Hahn, *Procedural Adequacy in Administrative Decisionmaking: A Unified Formulation*, 30 AD. L. REV. 467 (1978); Verkuil, *supra* note 10, at 304.

[358] The term is defined in K. DAVIS, ADMINISTRATIVE LAW TEXT § 15.03 (3d ed. 1972).

[359] Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975). *See also* Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1259 (1966).

[360] *See, e.g.*, Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511 (1969), suggesting that agencies should increase their efforts to ascertain the views of poor people, and also recommending creation of a Poor People's Counsel organization to

The importance of assuring this access is highlighted by the deference a reviewing court owes the substantive decisions made by the agency.[362] Because of the very broad discretion Congress has entrusted to the agency, its final decisions are often effectively unchallengeable on the merits. Hence, an opportunity to participate in the administrative process may be "an affected party's only defense mechanism."[363] Even if he fails in his efforts to persuade the decisionmaker, his opportunity to try may be rooted in the First Amendment's right of petition as well as the Due Process Clause.[364]

In *D.C. Federation of Civic Associations, Inc. v. Volpe*,[365] one court analogized the right to participate in administrative decisionmaking to the right to vote. Although the opinion conceded that the rights were not exactly equivalent, Judge Wright noted that the purpose and effect of both a hearing and a vote were to elicit the wishes of the "electorate." Given the basic and fundamental nature of the right of effective participation in the political process, the court held that excluding residents of the District of Columbia from the procedural protections granted residents elsewhere to public hearings on federally funded

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help the poor obtain affirmative representation of their interests. *Id.* at 523–45. *See also* Crampton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 Geo. L.J. 525 (1972).

[361] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), suggesting that prejudice against such groups might seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities.

[362] *See* Costle v. Pacific Legal Found., 445 U.S. 198, 214–16 (1980). One court commented, "When substantive judgments are committed to the very broad discretion of an administrative agency, procedural safeguards that assure the public access to the decisionmaker should be vigorously enforced." Western Oil & Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir. 1980).

[363] *See* Chamber of Commerce v. OSHA, 636 F.2d 464, 470 (D.C. Cir. 1980), discussing the importance of the APA procedures.

[364] The same possibility was raised in debate on the Senate's Regulatory Reform Bill. *See* 128 Cong. Rec. S2703 (Daily ed. Mar. 24, 1982) (remarks of Sen. Levin).

[365] 434 F.2d 436 (D.C. Cir. 1970).

highway construction might render the statute unconstitutional on equal protection grounds.

The right to vote is not an exact analogy, however. When questions are to be decided by vote of the electorate, the method of decision is clear. The votes are counted, and the outcome is determined by that count. Officials have no discretion to exercise and no weighing to do: the majority rules. In notice-and-comment rulemaking, however, the responsible official has been given some discretion about how to achieve congressionally mandated goals. Decision-making power and responsibility have been delegated to him or her, and not to the interested public.[366] He or she is required to exercise that discretion in the public interest and not merely to count noses. Indeed, a nose count of those who choose to comment would rarely approximate a true picture of the electorate, since notice-and-comment proceedings are much less comprehensible and accessible to the average citizen than is the process of voting.[367]

The analogy of a right to lobby or persuade is also more apt because the impact of comments on outcome cannot so easily be discerned. If an election were a landslide, one can be certain that the marginal effect of any excluded voter would be negligible. It is not so easy to dismiss opportunity to comment, since each comment is not merely tallied, pro or con. It is always possible that one well-reasoned presentation could trigger a change of mind by the responsible decision-maker. Because the effect on outcome is much more speculative, a focus on whether the result would be changed by accepting comments[368] would be inappropriate in notice-and-comment cases.

Moreover, denials of voting rights, while serious, are by nature of limited duration. Terms will expire and new elections will be held. Prospective injunctive relief can offer remedy then. Federal rulemaking, on the other hand, is not cyclical, so the effects of procedural lapses cannot so easily be left for redress "the next time."

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[366] *See* Bonfield, *Public Participation supra* note 14, at 542.

[367] The cost of effective participation in agency proceedings is a highly significant barrier. *See* Lazarus & Onek, *The Regulators and the People,* 57 VA. L. REV. 1060, 1096–97 (1971). Of course, even the results of an election may not reveal the true preferences of the electorate, since the right to vote, however precious, is one which ordinary citizens often do not exercise. In 1968 Richard M. Nixon was elected president by only 27% of the total number of potential voters. *See* REPUBLICAN NATIONAL COMMITTEE, THE 1968 ELECTIONS (rev. ed. 1970). *See also Federal Voter Registration: A Proposal to Increase Voter Participation,* 8 COLUM. J.L. & SOC. PROBS. 225 (1972).

[368] Federal courts considering whether to invalidate state elections because of voting irregularities have been hesitant to take this extraordinary step unless the violation clearly could have altered the outcome. *See, e.g.,* Griffin v. Burns, 431 F. Supp. 1361, 1368 (D.R.I. 1977). *See generally* Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections,* 49 N.Y.U. L. REV. 1092, 1124–27 (1974). Such authority should not be transferred uncritically to the administrative arena.

V. REMEDY FOR PROCEDURAL ERROR

Courts which find that an agency erred in assuming it had "good cause" to omit some procedures are troubled by the problem of affording an appropriate remedy. They wish to affirm the importance of providing proper procedure and deter agencies from taking shortcuts, yet it is impossible to turn the clock back even if the agency is ordered to begin again. Furthermore, even compromise solutions often mean substantial disruption of important government programs.

When an agency did not afford proper prior notice and opportunity to comment in formulating a rule, the court faces difficult choices. One possibility often sought by petitioners is to invalidate the rule, compelling the agency to begin again, this time following the prescribed procedures. This alternative comes closest to ensuring the petitioners and other members of the public their full procedural due, enabling them to offer input before the agency has made its choices a matter of public record. However, unless there are substantive problems with the invalidated rules, so that the agency's original choices have been foreclosed, it might be expected that the agency would exhibit the same attachment to the choices already made that courts point to in insisting that input must come early in the process to have any chance of persuading.[369] Nonetheless, of the options presently available, invalidation unquestionably has the strongest impact on the agency and underlines the importance attached to procedural regularity.

Especially in "good cause" cases, however, courts are hesitant to employ that option.[370] Agencies advance plausible reasons to support the choice to act with dispatch; rarely will an agency act in complete bad faith to circumvent the congressional choice of procedure. Even if a reviewing court finds that the value of public participation outweighs those justifications, it is faced with rules already in place. Invalidation would often mean confusion in trying to administer on-going programs being run by those rules. Furthermore, if part of the reason why notice and comment were not provided was time constraint, asking the agency to begin again introduces additional delay before often worthy substantive goals can be achieved.

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[369] "After the final rule is issued, the petitioner must come hat-in-hand and run the risk that the decisionmaker is likely to resist change." Sharon Steel Corp. v. EPA, 597 F.2d 377, 381 (3d Cir. 1979).

[370] *See infra* text accompanying notes 371–376, and Note, *Remedies for Noncompliance with Section 553 of the Administrative Procedure Act,* 1982 DUKE L.J. 461.

In light of these considerations, some courts have exercised their inherent equitable powers to reconcile the need to uphold the value of prior public participation, yet allow the agency to carry out important responsibilities. For instance, in several cases challenging EPA's promulgation of designations of "nonattainment" areas, the courts held that although the EPA did not have good cause to omit notice and comment, the improperly promulgated designations would be left in effect pending completion of new administrative proceedings in accordance with the APA.[371]

Curiously, these same courts rejected EPA's argument that any procedural error had been cured by its solicitation and consideration of comments at the time the designations were promulgated. The court's remand for another round of notice and comment while the rules remained in effect seems designed to do little more than repeat the post-promulgation exercise which the agency had already provided and which the courts had held was insufficient to remedy the harm. The "psychological and bureaucratic realities"[372] which reduce the value of an opportunity to persuade once the agency has staked out a public position seem little changed even if the opportunity is provided by court order.

Other courts facing the problem of fashioning a remedy which will redress the harm but not unduly interfere with the goal of attaining clean air without delay have chosen a different solution. They have afforded very narrow relief, leaving the challenged rules in effect except as to the named petitioners and the classifications they specifically object to.[373] Any limited effect might be hard to maintain; others against whom enforcement of the procedurally defective rules was sought would have a strong argument that collateral estoppel should extend the benefit of the decision to them.[374] Moreover, even if relief could be limited to only those who complain, this solution appears to invite redundant litigation if the only fault with a rule is its defective procedural history. Surely one decision should be enough on that point, although EPA's nonattainment rule has already spawned seven appellate opinions as each circuit renders its own.[375] Widespread use of "relief only for those who ask for it" decrees would foreseeably increase the number of challenges filed as each regulated entity would probably seek to protect its interest by docketing a request for relief.

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[371] *See, e.g.*, Western Oil & Gas Ass'n v. EPA, 633 F.2d 803 (9th Cir. 1980); United States Steel Corp. v. EPA, 649 F.2d 572 (8th Cir. 1981).

[372] New Jersey v. EPA, 626 F.2d 1038, 1050 (D.C. Cir. 1980).

[373] Sharon Steel Corp. v. EPA, 597 F.2d 377, 381–82 (3d Cir. 1979); New Jersey v. EPA, 626 F.2d 1038, 1050 (D.C. Cir. 1980).

[374] *But see* Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C.L. Rev. 123 (1977).

In other cases, the concern is more often to avoid the chaos which an abrupt invalidation of rules in place would generate. There, courts have stayed the effect of a decree of invalidation, thereby giving the agency a limited time to conduct proper rulemaking procedures.[376] As in the EPA cases, some skepticism may be appropriate about the efficacy of a judicial order to the agency to keep an open mind, especially once regulations are in place and functioning.

Nonetheless, these decisions do attempt to make clear to the agency that in future rulemaking, greater effort should be made to ensure prior notice and comment. Courts recognize that although the choices are not perfect, some judicial action is required. Otherwise, agencies would render the provisions of section 553 unenforceable by simply ignoring them and presenting the reviewing courts with a fait accompli.[377]

VI. RECOMMENDATIONS

The problem of crafting a general exemption from public participation requirements involves three issues. First, the agencies must be instructed about the importance Congress attaches to procedural regularity. Second, Congress should define with more specificity second-best procedures to be used, even in emergency situations, to safeguard the value of public participation. Third, Congress should address the problem of remedy for procedural error.[378]

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[375] The only court to explicitly consider the collateral estoppel argument rejected it. *See* Western Oil & Gas Ass'n v. EPA, 633 F.2d 803, 808–10 (9th Cir. 1980).

[376] *See, e.g.,* Mobay Chemical Corp. v. Gorsuch, 682 F.2d 419 (3d Cir. 1982).

[377] As Judge McGowan wrote, "An agency's functions will be impaired any time it is reversed on procedural grounds, and such occasional impairments are the price we pay to preserve the integrity of the APA." New Jersey v. EPA, 626 F.2d 1038, 1048 (D.C. Cir. 1980).

[378] There are hints that courts may discover a constitutional due process basis for the right to offer comments. *See, e.g.,* Curlott v. Hampton, 438 F. Supp. 505 (D. Alaska 1977), and *supra* note 385. If the right emanates from our basic charter and is not a matter of congressional grace, Congress may not have the last word about how that right is to be safeguarded. See the celebrated article by Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362 (1953); Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis,* 27 STAN. L. REV. 905 (1975). *See also* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

Under the Supreme Court's current analysis, due process is a flexible concept, in which the needs of the polity must be weighed against the interest of the individual. But as

In a statute designed to govern agencies as diverse as the ICC, SEC, HHS, and EPA, to name a few, it may be impossible for Congress to specify with more precision what is or is not "good cause." Congress must allow agencies some flexibility to determine when public procedures may come at too high a price as new situations present themselves, but it is appropriate for Congress to express a strong presumption in favor of using public participation. The benefits of the procedure are often articles of faith, "soft" and general, such as enhanced public satisfaction with an "open" process. The costs are much more visible and apparent to an agency understandably concerned about accomplishing its substantive mission. Precisely because agencies may tend to undervalue process benefits, it is up to Congress and the courts to safeguard them.[379]

The APA's "good cause" exemption was intended to be[380] and has remained a narrow one.[381] Congress has devoted attention to the "good cause" exemption in several regulatory reform bills. In Senate bill 1080, which passed the Senate unanimously on March 24, 1982, attention was focused on the "good cause" exemption in an attempt to underline the need for public participation. The exception was split: in issuing minor or technical rules which have "insignificant impact,"[382] roughly those situations where current law would deem public procedures "unnecessary,"[383] agencies were permitted to dispense with public participation. Rules of this nature would probably not move any person to go to the expense and effort to offer comment if notice were given, so any procedure would be a sterile exercise and an unnecessary delay. If the agency misjudges the impact of a rule, and the affected public does wish to comment,[384] petitions to reconsider can alert the agency to the need for more deliberation and public procedures.

Senate bill 1080 made separate provision for rules where the agency for good cause finds that prior public procedure will be "impracticable

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Rabin points out, the administrative hearing cases do not involve access to court, which could be regarded as both fundamental and less intrusive and costly than a requirement of a hearing. See Rabin, *supra*, at 909 n.20.

[379] Similar arguments have been advanced in support of the National Environmental Policy Act. *See* Cramton & Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511, 514–17 (1973).

[380] See *supra* text accompanying note 25.

[381] Courts have taken this intention seriously. *See, e.g.*, Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581 (D.C. Cir. 1981).

[382] S. 1080, § 553(b)(3), 97th Cong., 2d Sess., 128 CONG. REC. S2713 (daily ed. Mar. 24, 1982).

[383] *See supra* text accompanying notes 96–101.

[384] For a particularly striking example, *see* Standard Oil Co. v. Department of Energy, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978), discussed *supra* at text accompanying notes 337–342.

or contrary to an important public interest."[385] In such cases, the agency would not be excused entirely from APA procedures; rather, it would have to comply with notice-and-comment requirements to the maximum extent feasible prior to the promulgation of the final rule and would have to fully comply as soon as reasonably practicable thereafter.[386] Thus, the agency would be under an obligation to open and maintain a rulemaking file and accept comments *after* the rule is promulgated if events make it difficult or impracticable to do so ahead of time.[387] Furthermore, "major" emergency rules would require a regulatory impact analysis as soon as possible.[388]

This revision, although perhaps unavoidably leaving considerable flexibility to the agencies facing varied problems, clearly expressed the congressional intention that public participation in federal rulemaking be very much the normal practice. The Report of the Senate Committee on Governmental Affairs stated its "fundamental belief that notice-and-comment procedures are valuable and should be applied wherever possible."[389]

Although these revisions do not at first glance appear to be major changes, they do serve the useful function of underscoring the importance Congress ascribes to public procedures. This congressional "mood"[390] would doubtless affect both agencies and reviewing courts whenever potential "good cause" situations arise. In addition, agencies would not be able to short-circuit completely the procedural requirements of the act except when they would be "unnecessary." Any temptation to overuse the "good cause" exception in order to avoid the bother of notice and comment, to the extent it now exists, would disappear.

As previously noted,[391] the Senate bill regularized the procedure when public comment would be desirable and useful, but cannot be solicited before action is required. In such situations, the bill directed the agency to solicit input to the maximum extent feasible prior to promulgation of the final rule, and to fully comply with its procedural obligations as soon as practicable thereafter.[392]

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[385] S. 1080, *supra* note 382, § 553(b)(2)(A).

[386] *Id.* § 553(b)(2)(C).

[387] *Id.* § 553(c) and (f).

[388] *Id.* § 622(d)(1).

[389] S. Rep. No. 305, 97th Cong., 2d Sess. 16 (1981).

[390] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

[391] *See supra* text notes accompanying 385–88. An identical bill was introduced in the 98th Congress on April 19, 1983. S. 1080, 98th Cong., 1st Sess., 129 Cong. Rec. S4909 (daily ed. Apr. 19, 1983).

[392] S. 1080, *supra* note 382, § 553(b)(2)(C).

This solution is an improvement over current law, where no such requirements are formally imposed.[393] However, it faces the same problems that a post-promulgation period for comment now poses: potential comment is often considered a waste of time by the public, which views the agency as having made its decision.[394] One possible response is to force the agency to take further action on the rule in light of comments received. One way to do this is to limit the agency's ability to issue "emergency" rules as permanent solutions to a regulatory problem.[395] Agencies could be instructed that only "interim" rules can be so issued, and be required to conduct proceedings leading to final rules in accordance with the procedures listed.[396]

Section 553(b)(2)(C) of Senate bill 1080 does use the term "final" rule,[397] perhaps hinting obliquely that interim measures may be appropriate, but the bill does not explicitly limit agency "good cause" rules to interim status. Another portion of the Senate measure does fix a time limit on the rules which may be issued without full procedural consideration. In the provision dealing with congressional review of agency rules, agencies are excused from submitting to Congress rules falling within the "good cause" exemption or issued in response to an emergency situation.[398] This subsection specifies that any such "emergency" rule shall terminate 120 days after the date on which it is issued, unless earlier withdrawn or set aside by judicial action.[399]

These two provisions, one requiring the agency to complete work on emergency rules, including a regulatory analysis if the rule is "major," and the other guaranteeing the rules a rather short life expectancy, will serve the useful function of encouraging the agency to devote its resources to improving any final rule rather than shoring up an "emergency" provision which will soon become moot.[400] The legislative veto provision turns any "emergency" rule into a 120-day "interim" solution to longer-term problems.[401] This automatic expiration will make any post-promulgation comment period more productive, since the agency will have to take further action to review and reissue a final rule for congressional approval.

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[393] Current § 553(b)(B) provides that notice and public procedure thereon are not required. The agency must comply with § 553(d) unless "good cause" separately exists not to, and must entertain petitions for reconsideration (§ 553(e)).

[394] See *supra* text accompanying note 85.

[395] Some "rules" are of such short duration, aimed at transitory events, that review of them becomes very difficult. *See, e.g.*, Fund for Animals v. Frizzell, 530 F.2d 982 (D.C. Cir. 1976), a challenge to the decision of the Secretary of the Interior to allow a limited hunting season for the greater snow goose and the Atlantic brant. By the time the case was argued on appeal, the harvest was "pretty well over," and a preliminary injunction would be all but futile. *Id.* at 987. The court did suggest that the Fish & Wildlife Service could and should solicit public comment ahead of time on the general standards it intends to apply in deciding whether an open season should be allowed on a species previously closed to hunting. *Id.* at 990.

[396] Such a solution was reached in American Fed'n of Gov't Employees v. Block, 655 F.2d 1153 (D.C. Cir. 1981). Levesque v. Block, 723 F.2d 175 (1st Cir. 1983).

[397] (C) the agency complies with the provisions of this subsection and subsections (c) and (f) of this section to the maximum extent feasible prior to the promulgation of the *final* rule and fully complies with such provisions as soon as reasonably practicable after the promulgation of the rule. (Emphasis added). S. 1080 *supra* note 382 § 553(b)(2)(c).

[398] *Id.* § 802(a)(1)(C).

[399] *Id.* § 802(a)(3).

Because the legislative veto has been held unconstitutional,[402] the concept of limited duration for summarily produced rules may be worth moving and lodging in section 553 itself. Just such a solution was advanced in House bill 1776, introduced in the 98th Congress on March 2, 1983,[403] cosponsored by 107 members. In the House bill, a new class of rule is created. "Emergency rule" is added to the definitional section, and describes a rule which is "promulgated and made temporarily effective without public notice and comment. . . ." Such a rule could be issued pursuant to a finding that delay "would: (a) seriously injure an important public interest; (b) substantially frustrate legislative policies; or (c) seriously damage a person or class of persons without serving any important public interest."[404]

Special procedures are spelled out for adopting emergency rules. At the time such a rule is issued, rulemaking proceedings would begin. The period for public comment would be limited to 60 days, but could be extended to 90 days if necessary to enable interested persons to participate. Within 30 days after the close of the public comment, the agency may issue a final rule replacing the emergency rule, but the bill provides for another round of comment if the agency proposes to adopt a rule "different in substance from the emergency rule." In any case, an emergency rule expires 210 days after its issuance unless earlier withdrawn, set aside by court action, or replaced by a final rule.[405]

Any such attempt to limit the duration of interim rules should be based on the time needed to produce a procedurally correct rule and should make clear that Congress expects "interim" rules to be valid until permanent rules are in place, so that the agency is not tempted to issue a series of "emergency" rules[406] or continue to enforce those which have technically expired.[407] Although it may be difficult to specify a hard-and-fast time frame, some outside limit on duration seems advisable to prod agencies to complete final rulemaking expeditiously.[408] Even seven months may not be long enough for some particularly controversial rules, so another element of discretion would be appropriate here, allowing the agency to take longer if it can demonstrate good reason to do so.

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[400] If the "emergency" rule is enforced, the question of procedural adequacy may well be a very live issue for appeal by those seeking relief from enforcement. *See, e.g.*, Daniel Int'l Corp. v. OSHRC, 656 F.2d 925 (4th Cir. 1981).

[401] If the rule will expire of its own weight before the 120 days have run, no repromulgation would be required.

[402] *See* INS v. Chadha, 51 U.S.L.W. 4907 (U.S. June 21, 1983).

[403] H.R. 1776, 98th Cong., 1st Sess. (1983).

[404] *Id.*

[405] *Id.*

Another related improvement would be congressional instruction to tailor emergency measures no more broadly than to meet the emergency at hand wherever possible.[409] Agencies should be expected and encouraged to engage in more deliberate and open decision-making to decide upon long-range solutions to recurring regulatory problems.

The issue is worthy of explicit consideration, given the tension between allowing government to act expeditiously and the risks of any summary procedure.[410] Even limiting government to "interim" rules is not a perfect solution: compliance with rules is often a costly effort, and voluntary compliance may become even more difficult to obtain if regulated entities are on notice that the rules may change.[411] Where investment in capital goods, new forms, or employee retraining will be necessary, agencies may be hampered in enforcing "interim" standards unless certainty can be built into the process. Furthermore, whatever compliance does take place in the interim period will have an effect on long-term agency decisions.[412] Reliance costs incurred by regulated parties are a legitimate factor to be considered when an agency contemplates whether to make a change from its "interim" rules.

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[406] Careful drafting should avoid the holding of SEC v. Sloan, 436 U.S. 103 (1978), that the SEC's practice of "tacking" 10-day summary trading suspension orders for long periods violated the congressional will. In that case, not "rules" but "orders" were involved. The pointed impact of such orders directed at one company and its shareholders raises serious due process concerns if drastic measures can be imposed for up to 13 years with no notice, opportunity to be heard, or statement of reasons beyond a laconic reiteration of the statutory criterion. Rulemaking, with its more diffuse impact, has traditionally been thought to be subject to fewer due process constraints. *Compare* Londoner v. City of Denver, 210 U.S. 373 (1908) *with* Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915).

[407] Such dilemmas were common in Wisconsin, where "emergency rules" remain in force for 120 days. WIS. STAT. § 227.0217(1) (1975). *See* Comment, *The Wisconsin Emergency Rule Provision: Increased Use in Response to a Slow Rulemaking Process*, 1978 WIS. L. REV. 485, 501 (1978).

[408] James O. Freedman suggested in an analogous situation that "Congress should impose statutory limitations on the effective periods of summary orders . . . only after a particularized examination of the agency and function involved." Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1, 54 (1972). Further, he suggested as appropriate the possibility that each agency would be required to implement by rule a general congressional directive to limit the duration of specified actions. *Id.*

[409] As is often the case, the source of this suggestion is an appellate court struggling to reconcile legitimate governmental interests with the need for public participation. *See* American Fed'n of Gov't Employees v. Block, 655 F.2d 1153 (D.C. Cir. 1981).

[410] When action is taken summarily, the decision may be based on incomplete or inaccurate information and may be perceived as high-handed and arbitrary. *See* Freedman, *supra* note 408.

Perhaps the most difficult question is what Congress can or should specify about enforcement of the procedural requirements it creates. Views on this question depend in large part on one's view of the primary purpose of procedure. Laurence Tribe has identified two alternative conceptions: one view is that there are *intrinsic* values to process, in that it ensures that persons will be treated as "persons," worthy of respect, and not as things. The other approach views process as *instrumental*; its goal is to assure the accuracy of the decision-making process.[413] The difference can be considerable, since the instrumental approach takes a much more generous view of harmless error. So long as the result is "right," lapses in procedure are "harmless," since the deficiencies did not interfere with reaching the correct result. If, on the other hand, process is intrinsically valuable, fewer errors will be considered "harmless," since a dignitary interest is invaded if process is slighted, regardless of the effect on outcome.[414]

The Senate's Regulatory Reform Act takes a very instrumental view of its procedural requirements. Senate bill 1080 and its legislative history exhibit a determination that court review of strictly procedural questions should be avoided unless the entire rulemaking has been seriously compromised. For instance, although various procedures such as oral argument and opportunity for cross-examination are listed as appropriate for rulemaking leading to a major rule, the bill provides for very limited court review. No court shall hold unlawful or set aside an agency rule for failure to use the procedures unless "such failure substantially precluded a fair consideration and information resolution of a central issue of the rule making taken as a whole."[415] Likewise, courts are forbidden from invalidating a rule for failure to properly maintain the rulemaking file unless "such violation has precluded fair public consideration of a material issue of the rulemaking taken as a whole.[416] Most important is the preclusion of review of the regulatory analysis except as a part of review of the final rule.[417]

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[411] For a recent example, companies which had installed costly water pollution control equipment bitterly oppose relaxing the rules to help their smaller competitors survive. An argument against the change in policy is that it will encourage foot dragging and increase the cost of achieving compliance. *See* Wall St. J., Sept. 23, 1982, at 37, col. 4.

[412] Although the CAB was not engaged in rulemaking, the same principle was at work when it made an interim award of an international airline route. Since substantial capital investment would be required in startup costs, the interim award could influence the selection of a permanent carrier. *See* Pan American World Airways, Inc. v. CAB, 54 Ad. L. Rep. (P&F) 419, 440–41 (D.C. Cir. 1982).

[413] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10–7 (1978).

[414] The Supreme Court has generally taken an "instrumental" view in deciding what process is due before government acts. *But see* Carey v. Piphus, 435 U.S. 247 (1978), where the Court recognized "the importance to organized society that [procedural] rights be scrupulously observed," and held that denials of procedural due process would support an award of nominal damages without proof of actual injury. *Id.* at 266. Thus, the Court recognized the intrinsic value of process, but refused to award substantial compensatory damages without proof of injury. The objective of constitutional tort remedies, said the Court, was to redress plaintiff's injury, not to punish defendants unless conduct was aggravated and malicious.

Without some form of judicial review, it is difficult to enforce the requirements which Congress seeks to impose. If in fact the process is thought important enough to be made a model for a wide range of government activity, it seems anomalous that so much discretion is lodged with the agencies about whether and how conscientiously to allow it. Other attempts to improve "internal management standards" designed to make agency policymaking more open, thoughtful, and candid, have been judged a failure.[418] Absent judicial oversight, the reform process proceeds on the same "optimistic assumption" that is said to underlie the Regulatory Flexibility Act:[419] that "highlighting the problem . . . and offering suggestions will allow agencies to solve problems they have largely created."[420] Outright preclusion of judicial review would be a clear signal to the agencies that these "requirements" were hortatory only; but overintrusive review was thought undesirable, adding expenses and delay and transforming the candid discussion of a probing analysis into a litigation brief.[421]

Both houses of Congress[422] propose a "balance," holding courts to a very instrumental view of procedure. Senator Leahy indicated that the backers of the Senate bill were concerned that this bill not become the lawyers' relief bill of 1982.[423] Judicial review was carefully and explicitly curtailed. Purely procedural missteps would not be enough to overturn an otherwise proper rule. Yet, given the broad discretion vested in many agencies, decisions are often virtually unchallengeable on the merits.

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[415] S. 1080, *supra* note 382, § 553(c)(3)(B)(ii).

[416] *Id.* § 553(f)(4).

[417] *Id.* § 623(d). This limit on judicial review of the analysis parallels the review provided by the Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (1982), at § 611. That compromise is characterized as "extremely qualified and ambiguous." Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 Duke L.J. 213, [illegible]

[418] Note, *Regulatory Analyses and Judicial Review of Informal Rulemaking*, 91 Yale L.J. 739 (1982).

[419] 5 U.S.C. §§ 601–612 (1982).

[420] Verkuil, *supra* note 417, at 229.

[421] *See* remarks of Charles Schultze, quoted in 128 Cong. Rec. S2396 (daily ed. Mar. 18, 1982) (remarks of Sen. Leahy). *See also* S. Rep. No. 305, 97th Cong., 2d Sess. 59–60 (1981).

[422] In the House, H.R. 746 § 622(b)(4) and § 623(b) contain similar provisions. H.R. 746 was introduced on January 6, 1981, and was referred to the House Committee on the Judiciary. The bill was favorably reported on February 25, 1982. H.R. Rep. No. 435, 97th Cong., 2d Sess. (1982).

The bill provides strong evidence of a new trend in American administrative law. Instead of relying on the political process to identify and force modifications of ill-conceived regulations, the new faith is in better agency analysis.[424] Senate bill 1080 would impose on most federal agencies the obligation to prepare a regulatory impact analysis for "major" rules.[425] Such a requirement has already been imposed on agencies within the executive branch by Executive Order 12291.[426] If this requirement becomes law, most federal agencies will be required to justify a major rule by discussing the costs and benefits associated with it as compared with other reasonable alternatives considered by the agency.[427] Although no mathematical precision is feasible or expected, the Senate clearly expects agencies to strive to achieve more "correct," efficient rules in terms of costs imposed and benefits achieved.[428]

Of course, there is no necessary conflict between accepting comments and preparing a regulatory impact analysis. The analysis, like any other, is only as good as the data on which it is based. An agency conscientiously carrying out its analytic responsibilities would want to gather as much input as possible from affected members of the public about potential costs and benefits. In fact, the Senate bill seeks to encourage more public participation and directs the agency's preliminary regulatory analysis to be included with the notice of proposed rulemaking to stimulate public input on these questions.[429]

What may change, however, is the nature of the judicial review of rulemaking. Courts may focus more on the outcome and less on the process. Martin Shapiro[430] has noted that courts in the 1960s and 70s accepted the "group theory" of politics, which defined a good policy as any policy which was the product of a decision-making process to which all the relevant groups had appropriate access. Therefore, any decision was automatically suspect if a group had not been heard. Now, however, the concern is with substantive rationality, to ensure that the decision is objectively "correct" and not just politically acceptable. If the yardstick for good decisionmaking has changed, the independent value of safeguarding access to the decisionmaker may decline. As the Senate bill makes clear, excluded challengers will have to demonstrate that additional participation would have a likely effect on outcome before courts even consider their complaint.[431] If the agency can convince a court that its rule is synoptically correct,[432] such challenges will likely fail. Even from this perspective, however, it may be that the change will not be so stark. Cost-benefit analysis is not an exact science, and there may be room in the equations for feelings of satisfaction with the way decisions were reached. If so, even in instrumental terms, the cost of extra procedure may well be justified in order to produce that political benefit.

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[423] 128 CONG. REC. S2392 (daily ed. Mar. 18, 1982) (remarks of Sen. Leahy).

[424] *See* Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

[425] *See* S. 1080, *supra* note 382, §§ 621–624.

[426] 46 Fed. Reg. 13,193 (1981), reprinted in 5 U.S.C. § 601 (1982).

[427] S. 1080 *supra* note 382, § 622(d)(2).

[428] *See* 128 CONG. REC. S2389–92 (daily ed. Mar. 18, 1982) (remarks of Sen. Laxalt).

[429] *Id.* at S2390.

[430] Shapiro, *On Predicting the Future of Administrative Law*, 6 REGULATION 18 (1982).

VII. CONCLUSION

The problem faced by Congress, courts, and agencies is weighing the importance of notice-and-comment procedures relative to other important values. It is very similar to the balance to be struck whenever government seeks to act summarily: the risk of acting on incomplete or inaccurate information, coupled with the cost in political acceptability when action is perceived as arbitrary and high-handed, must be measured against the need for government to act effectively and economically.[433] Although the Supreme Court has demanded more process when government action is taken against one individual or a small group of individuals "exceptionally affected . . . upon individual grounds",[434] the impact of some more general rules can be equally calamitous to the individuals affected.

If the rule changes do have an especially drastic impact, courts could subject the question of public participation to constitutional scrutiny.[435] In most cases, however, this weighing and balancing will be left to the

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[431] *See supra* text accompanying notes 415–417. Successful challenges are not impossible even with this standard. The D.C. Circuit recently interpreted a similar restriction in the Clean Air Act, 42 U.S.C. § 607(d)(9)(D) (1982), and found the standard met. *See* Kennecott Corp. v. EPA, 54 Ad. L. Rep. 2d (P&F) 630 (D.C. Cir. 1982).

[432] Diver characterizes the "synoptic" decision-making method as "comprehensive rationality," where the decision-maker defines his goals, identifies and considers all possible methods of reaching his goals, and selects the alternative which will make the greatest progress toward the desired outcome. Diver, *supra* note 424, at 396.

[433] *See* Freedman *supra* note 408.

[434] Bi-Metallic Investment Co. v. State Board of Equilization, 239 U.S. 441, 446 (1915).

[435] *See supra* note 378.

Congress. Since 1946, Congress has in fact devoted considerable attention to procedural matters in creating new regulatory agencies.[436] However, as the flurry of "good cause" cases shows, Congress has also sent agencies potentially conflicting signals. Congress wants regulatory rules to be carefully analyzed, well-reasoned, subjected to public comment, and in place on very short notice. In many instances, except for the opaque "good cause" exemption, Congress has not specified which of these expectations should be given priority.[437]

Senate bill 1080 is an attempt to draw the lines more clearly. Even so, it may be impossible to be much more precise in advance. In all probability, courts and agencies may have to do the final balancing as cases arise in the future, just as they have in the past.

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[436] Hamilton, *supra* note 19.

[437] Congress could design unique procedures for each agency, and in creating new agencies, it often has, with the result that "the procedural portions of these statutes are almost unbelievably choatic." Hamilton, *supra* note 19, at 1315. Alternatively, Congress could focus on agency functions, such as imposing sanctions, ratemaking, and so on, and tailor procedures for each. Verkuil, *supra* note 10, presents such an analysis. But as Scalia reminds us, what appears to drive congressional concern with administrative procedure is not fairness or efficiency; rather, both Congress and lobbyists know full well that procedure is a way to adjust power, "not just the power to be unfair but the power to act in a political mode, or the power to act at all." Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 405 (1979).

BACKGROUND REPORT FOR RECOMMENDATION 83-3

AGENCY REVIEW OF ADMINISTRATIVE LAW JUDGES' DECISIONS

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I. Introduction

Adjudicatory hearings in federal administrative agencies generally are presided over by administrative law judges (ALJs).[1] With rare exception the presiding ALJ will render a decision subject to review and confirmation by some other official or group of officials within the agency.[2] In many instances the nominal reviewing official is the head of the agency (including within that term members of collegial bodies) although in other cases subordinate officials are charged with that responsibility.[3] The Administrative Conference some fifteen years ago adopted Recommendation 68-6 encouraging increased delegation of authority to decide adjudicatory cases to two groups other than agency heads. The Recommendation advocated granting greater authority to subordinate reviewers in some instances (through the establishment of intermediate review boards) and to ALJs in others (through more deferential, certiorari-type review standards).[4] This report examines the impact of various intra-agency review processes and discusses the appropriate locus and scope of intra-agency review. Part I attempts to place the problem of intra-agency review. Part I attempts to place the problem of intr-agency review in perspective, relating it to other administrative law issues. Part II discusses ACUS Recommendation 68-6 and its effect on agency review of ALJ decisions. Part III explores review processes at selected agencies, and Part IV evaluates the utility of different review processes.

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1. 5 U.S.C. § 556(b)(3) (1976). More than 1,100 ALJs are employed by twenty-nine federal agencies; the number of ALJs is roughly twice the number of United States District Judges. See Lubbers, Federal Administrative Law Judges: A Focus on Our Invisible Judiciary, 33 AD. L. REV. 109 (1981). For a list of the types of cases presided over by ALJs as well as other information concerning ALJ decisionmaking, see ADMINISTRATIVE CONFERENCE OF THE U.S., FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS -- STATISTICAL REPORT FOR 1976-1978 (1980) (hereafter ACUS STATISTICAL REPORT).

2. 5 U.S.C. § 557(b) (1976). See Appendix 1 to Part III, infra, text at notes 309-354. The term "agency" is used here to indicate "independent" agencies, executive departments, and bureaus within such departments (e.g., the Social Security Administration of the Department of Health and Human Services).

3. Review processes are summarized infra, text at notes 144-168.

4. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, REPORTS AND RECOMMENDATIONS 122-24 (1968) (hereinafter ACUS 68-6).

1. Intra-Agency Review in Perspective: Two Models of Agency Adjudication

A. Bipolar and Other Approaches to Agency Action

Determination of the appropriate level and intensity of intra-agency review necessarily implicates assumptions about the nature of the adjudication. Two very different models of agency decisionmaking are reflected in administrative law writing. One, which may be called the "judicial model," posits a process by which a neutral arbiter weighs evidence and ascertains facts.[5] The paradigm of the matters at issue is the descriptive fact: an "objective" determination that something did happen, does exist, is of a certain nature or dimension.[6] The contrasting model is the "political model," in which decisions do not turn on descriptive facts but on the identity of interested parties, the intensity of their interests, and on assumptions about the impact of particular decisions on future events.[7] Of course, there are many decisions that encompass aspects of both models--indeed, it may be argued that *every* decision in the real world of administrative action encompasses elements of both--but most writing about administrative law is premised on these as the classic examples of the two distinct kinds of decision administrators make.[8]

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[5] *See*, *e.g.*, Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546, 558-59 (1969).

[6] *See*, *e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.02-7.03 (2d ed. 1978). To a significant degree, disputes over entitlement to social security disability insurance funds are disputes over matters of descriptive fact: what is the nature of the claimant's injury. what tasks can he perform? what has he done since the injury? The decisionmaking process is described in R. DIXON, SOCIAL SECURITY DISABILITY AND MASS JUSTICE: A PROBLEM IN WELFARE ADJUDICATION (1973); J. MASHAW, BUREAUCRATIC JUSTICE (1983); and sources cited in note 81, *infra*.

[7] 1 K. DAVIS, *supra* note 6, at §§ 7.02-7.03; *see also* Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183 (1973); Robinson, *The Federal Copmmunications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 175-76 (1978). A paradigm of this model in the administrative context is the Federal Communication Commission's decision whether, and on what basis, to allow "pay" television (especially cable-delivered pay television) to compete with commercial broadcast television. *See* First Report and Order on Subscription TV Programs Rules 52 F.C.C.2d 1 (1975) (full cite at note 232 *infra*).

Although there is widespread acceptance of these as useful abstractions of administrative decisionmaking, there is not consensus on the models' implictions for administrative organization and operation. One school would build administrative procedure rather rigidly around the models. Those who adopt this "bipolar" approach would use different decisionmaking processes and different decisionmakers for the decisions suited to the judicial model from those persons and processes used for decisions apposite to the political model.[9] The classic division of processes is between trial-type proceedings adjudicating disputed matters of descriptive fact and less structured proceedings that seek to identify a consensus among interested parties on policies to be applied prospectively.[10] It often is argued that this is the approach followed by the Administrative Procedure Act of 1946 (APA),[11] separating adjudication (judicial model) from rulemaking (political model).[12] Despite the textual provision for informal adjudication and formal rulemaking, the APA generally follows a bipolar approach in its division of issues and procedures. Adjudication frequently involves adversary presentation of evidence, cross-examination, oral argument as well as written, and restriction of the basis for decision to those matters adduced at "trial."[13] Rulemaking usually looks toward formulation of a "statement of general or particular applicability and future effect designed to ... prescribe law or policy ..."[14] Its process is comparatively informal, consensual, and non-adversarial, consisting of a public notice that policy is to be made, followed by receipt of written comments, evaluation of record and non-record material, and announcement of a rule.[15]

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[8] *See*, *e.g.*, K. DAVIS, *supra* note 6, at §§ 7.03, 7.05; Freedman, *supra* note 5; Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103; Pierce, *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Engergy Policy*, 31 HASTINGS L.J. 1 (1979); Pops, *The Judicialization of Federal Administrative Law Judges: The Implications for Policy Making*, 81 W. VA. L. REV. 169 (1979); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

[9] This position is taken generally by the authorities cited at note 8, *supra*, as well as by numerous judicial opinions, *see*, *e.g.*, Association of National Advertisers, Inc. v. Federal Trade Comm'n, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *compare id.* with Cinderella Career & Finishing Schools, Inc. v. Federal Trade Comm'n, 425 F.2d 583 (D.C. Cir. 1970).

[10] Professor Davis characterizes the distinction as one between processes for determining "adjudicative facts" and "legislative facts," *see* K. DAVIS, note 6 *supra*, at §§ 7.03, 7.05, and points to two Supreme Court decisions from the early part of this century as establishing the distinction between the procedures, *id.* at § 7.03, *citing* Londoner v. Denver, 21- U.S. 373 (1908), and Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

[11] 60 Stat. 237 (1946), as amended, *codified at* 5 U.S.C. § 551 *et seq.* (1976).

The Attorney General's Manual on the Administrative Procedure Act, issued shortly after adoption of the APA, emphasizes the Act's embrace of the bipolar approach:

> [T]he entire Act is based on a dichotomy between rule making and adjudication .... Rule making is ... essentially legislative in nature, not only because it operates in the future but because it is primarily concerned with policy considerations. The object of the rule making proceedings is the implementation or prescription of law or policy for the future rather than the valuation of respondent's past conduct....

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[12] See, e.g., United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 224 (1972); See also statement of Carl McFarland, a member of the Attorney General's Committee on Administrative Procedure which drafted the basic blueprint for the APA, testifying as Chairman of the American Bar Association Committee on Administrative Law, Hearings on Administrative Procedure Before the House Committee on the Judiciary, 79th Cong., 1st Sess. 29 (1945): "There are two kinds of operations as all studies have indicated and any practitioner knows: Number 1, the issuance of a general regulation, which is similar to a statute; Number 2, the matter of an adjudication, similar to the judgment of a court."

[13] See 5 U.S.C. § 556 (1976); see also Davis, Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer, 1977 DUKE L.J. 389; Pops, supra note 8.

[14] 5 U.S.C. § 551(4) (1976).

[15] 5 U.S.C. § 553 (1976).

> Conversely, adjudication is concerned with the determination of past and present rights and liabilities.[16]

The APA reinforced this view by creating a special class of officials to preside over adjudication.[17] These officials, formerly "hearing examiners," now administrative law judges, are insulated from contact with agency personnel who investigate and prosecute cases.[18] In addition, they are almost wholly outside the direct control of the more politically-responsive officials who head the employing agency and who decide the rulemaking issues that a bipolar approach assimilates to the political model.[19] Thus, ALJs are protected against removal by their employing agencies except for good cause as determined by the Merit Systems Protection Board (formerly part of the Civil Service Commission).[20] Their pay is set by the Office of Personnel Managment (OPM, formerly the Civil Service Commission) independently of agency recommendations or ratings.[21] Assignment of cases to hearing examiners is required to be in rotation so far as is practicable, and the Act forbids agencies from requiring them to "perform duties inconsistent with their duties and responsibilities as hearing examiners.[22]

In opposition to the bipolar approach are a number of writings claiming (for different reasons) that the polar models' utility does not extend to service as templates for administrative procedure.[23] The common complaint is that while it may be useful to think of the judicial and political processes as legitimate mechanisms for resolving different sorts of disputes, administrators cannot simply identify a problem as belonging to one model or the other and then apply that model's process.[24] One argument is that no administrative problem fits well under either paradigm but rather all fall somewhere between and thus require intermediate procedures.[25] A related argument is that some administrative problems are suited neither to trial-type proof nor to consensual, interest-based resolution, meriting instead a "managerial" or "scientific" decision process.[26] Still other dissenters from the bipolar approach urge that values inherent in broadened participation in public decisionmaking support blurring the line between the judicial and political models, promoting the involvement of more parties in adjudications and granting interested parties more control over decision in rulemakings.[27]

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[16] See U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14-15 (1947) [hereafter ATTORNEY GENERAL'S MANUAL].

[17] 5 U.S.C. §§ 556(b)(3), 3105 (1976).

[18] 5 U.S.C. § 554(d) (1976).

[19] See generally Scalia, The ALJ Fiasco: A Reprise, 47 U. CHI. L. REV. 57 (1979).

[20] 5 U.S.C. § 7521 (1976).

[21] 5 U.S.C. § 5372 (1976).

[22] 5 U.S.C. § 3105 (1976).

The significant point for analysis of administrative adjudications is that most of these non-bipolar approaches would provide some "political" input in cases that seem largely amenable to the judicial model. If adjudications cover matters that are not wholly separable from political concerns, the means of decision and the deciding officials also need not be wholly apolitical.[28] Despite the substantial congruence of the APA and the bipolar approach, this more synthetic view of administrative process also receives support from the Act. Administrative law judges, while largely segregated from contact with and control by others within their employing agency, are not wholly separate from the agency staff that may be initiating, approving, or prosecuting cases before them -- the ALJs and staff share a common boss.[29] Nor is this a matter merely of interest to those who draw organizational charts, since the agency head explicitly is authorized to dispense with initial decisions by ALJs and instead decide matters himself or in reviewing ALJs' initial decisions to exercise the full powers he would have had absent ALJ decision.[30] An agency head may, if he deems it proper, reverse the ALJ on any ground so long as there is a reasonable basis for the ultimate decision, a requirement that would obtain in all events.[31] Outside of findings on witness credibility, where demeanor is important, few determinations seem as a matter of law wholly committed to disposition by ALJs.

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[23] See Boyer, Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues, 71 MICH. L. REV. 111 (1973); Jaffe, supra note 7; Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 B.U. L. REV. 885 (1981); Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure, 118 U. PA. L. REV. 485 (1970); Stewart, Regulation, Innovation, and Administrative Law: A Conceptual Framework, 69 CAL. L. REV. 1256 (1981). Cf. Linde, Due Process of Lawmaking, 55 NEB. L. REV. 197 (1976).

[24] Boyer, supra note 23, at 169; Robinson, supra note 23, at 536.

[25] E.g., Robinson, supra note 23 at 536-39.

[26] Boyer, supra note 23, at 150-164. See also Stewart, supra note 23, at 1368 (recommending a "scientific" analysis of an agency decision's "effect upon innovation").

[27] See Mashaw, supra note 23; Mashaw, Conflict and Compromise Among Models of Administrative Justice, 1981 DUKE L.J. 181; Stewart, supra note 23, at 1372.

The agency head may, of course, act in a "judicial" manner, just as an ALJ presumably does. But the agency head is unlikely to preclude "political" considerations to the same degree. Unless the agency head makes policy decisions as abstractions from real-world problems, utterly without concern for the nature and identity of the competing interests, his policies will have some flavor of political decisionmaking.[32] In reviewing adjudications or in adjudicating matters himself, the agency head necessarily is sensitive to the political considerations that informed the policy decisions.[33] Indeed, it is his capacity, unique within the agency, to evaluate those considerations that prompted the APA's crafters to retain agency review of adjudications; wholly independent adjudications, lacking the agency head's sensitivity to factors not easily captured in rule form, might produce policies at odds with those the agency, acting within its delegated power, seeks to advance.[34] Politically responsive decisionmaking need not imply a preference for Democrats over Republicans or any other decision basis that most would view as unrelated to the merits of the contest. It does imply a concept of decision on the merits that potentially includes an array of factors outside the judicial ken.[35]

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[28] See Robinson, supra note 7, at 228; Scalia, supra note 19.

[29] 5 U.S.C. §§ 556(b), 557(b), 3105 (1976); see FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 55-60 (1941) [hereafter FINAL REPORT].

[30] 5 U.S.C. § 557(b) (1976).

[31] See e.g., Federal Communications Comm'n v. Allentown Broadcasting Corp., 349 U.S. 458 (1955); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[32] See Jaffe, supra note 7, at 1188.

[33] Id., at 1194-96.

The APA's approach to administrative process, thus, is rather ambivalent. The APA, however, is only one factor governing the nature of agency decisions. Another factor is the legislation specifically concerned with each agency or program. While many of these are silent as to decisional process, many do specify the considerations critical to decision, the manner in which decision should be reached, and the organization of the administrators involved.[36] In some instances, Congress has chosen decisional processes or considerations that seem more plainly patterned on the judicial model than the broadly-applicable adjudication provisions of the APA. During the 1970s, for example, Congress passed legislation setting up two agencies charged exclusively with adjudicating cases.[37] In each case, another agency decides whether to pursue particular cases and adopts the substantive rules that implement the organic legislation.[38] Congress also has in some instances mandated "hybrid" procedures that seem plainly to mix policy formulation with decision of descriptive fact.[39] The more usual pattern is for Congress to identify relevant considerations, without precise definition of them, and to require or not require "hearings," without detailing what function the hearings or the various putative participants in them should perform.[40] Specific legislation, thus, provides no clear picture of a general, congressionally-dictated pattern for agency adjudication even though it gives substantial direction in some particular instances.

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[34] *See* FINAL REPORT, *supra* note 29 at 57-58.

[35] *See* Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305, 316-20 (1972); Robinson, *supra* note 7, at 224-36.

[36] *See* Jaffe, *supra* note 7, at 1188-89.

[37] The Occupational Safety and Health Review Commission, which is separate from the Occupational Safety and Health Administration of the Department of Labor (OSHA), was created by the Occupational Safety and Health Act of 1970, 29 U.S.C. § §§ 651-6788 (1976), to adjudicate contests over OSHA citations. The Federal Mine Safety and Health Review Commission hears enforcement actions brought by the Department of Labor's Mine Safety and Health Administration and was crated by the Federal Mine Safety, and Health Amendments Act of 1977, 30 U.S.C. § 801 *et seq.* (Supp. IV 1980).

B. ALJs: The Cases for More Independence and Less

In most cases, then, the nature of the administrative adjudication, whether strictly adhering to the judicial model or conforming more to some other paradigm, must be determined without explicit congressional guidance. One may make some inferences from the APA, procedural provisions in other statutes, and the specific substantive considerations those statutes make relevant, but significant room is left for disagreement premised on different notions of how certain administrative decisions should be made. The numerous discussions of administrative adjudications in general and of the role of administrative law judges in particular reflect these different conceptions of administrative decisionmaking.[41]

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[38] Both adjudicating agencies deal with regulations enacted and citations isused by the Labor Department. 29 U.S.C. §§ 655, 659, 662 (1976); 30 U.S.C. § 811 (Supp. IV 1980). See generally Currie, OSHA 1976 AM. B. FOUND. RES. J. 1107 (describing the operaton of, and problems with, the administrative scheme for occupational safety and health); Sullivan, Independent Adjudication and Occupational Safety and Health Policy: A Test for Administrative Court Theory. 31 AD. L. REV. 177, 187-83 (1979) (describing the competing bills concerned with this division of responsibility, the opposed factions, and the compromise enacted).

[39] See, e.g., Federal Trade Commission Improvement Act of 1974 (Magnuson-Moss Act), 15 U.S.C. § 57a (1976).

[40] See, e.g., Communications Act of 1934, 47 U.S.C. § 151 et seq. (1976).

[41] See, e.g., Davis, supra note 13; Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975); Pops, supra note 8; Scalia, supra note 19; Verkuil, The Emerging Concept of Administrative Procedure, 78 COLUM. L. REV. 258 (1978).

ALJs themselves almost invariably embrace the judicial model as the appropriate paradigm for all ALJ decisionmaking. They have pressed vigorously for more insulation from agency control, notably advocating creation of a "unified ALJ corps" wholly divorcing ALJs from affiliation with any substantive agency.[42] They labored hard to earn the appellation "administrative law judge" instead of the less judicial "hearing examiner."[43] ALJs also have argued for more security and less variation in pay and civil service rank and vigorously oppose any scheme for critical evaluation of their work, urging their need for something that approaches the same independence as Article III judges (who are granted lifetime tenure and guaranteed irreducible pay).[44] ALJs are fond of pointing out that the Attorney General's Committee on Administrative Procedure (which in its 1941 Final Report set out the basic blueprint for the APA) in proposing a statutorily recognized class of "hearing commissioners" had stated the necessity of giving these officials both status and independence, saying that to secure "men of ability and prestige" the Congress must grant them "a tenure and salary which will give assurance of independent judgment."[45]

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[42] FEDERAL ADMINISTRATIVE LAW JUDGES' CONFERENCE, STATEMENT AND RECOMMENDATIONS TO THE UNITED STATES CIVIL SERVICE COMMISSION 12-13 (1973); see also Gladstone, Commentary: The Adjudicative Process in Administrative Law, 31 AD. L. REV. 237, 243 (1979); Segal, The Administrative Law Judge: Thirty Years of Progress and the Road Ahead, 26 A.B.A.J. 1424-28 (1976).

[43] Congress initially had used the title of "examiner" rather than the term "hearing commissioner" (see FINAL REPORT, supra note 29, at 46-53), later changed to "hearing examiner," 80 Stat. 386, 415 (1966). The statutory change to "administrative law judge" was effected in 1978, Act of Mar. 27, 1978, Pub. L. No. 95-251, 92 Stat. 183, although the title already had been granted six years earlier by the Civil Service Commission, 37 Fed. Reg. 16,787 (1972).

[44] See FEDERAL ADMINISTRATIVE LAW JUDGES' CONFERENCE, supra note 42; Administrative Law Judge System: Hearings Before Subcomm. for Consumers of Sen. Comm. on Commerce, Science & Transp., 96th Cong., 2d Sess. (Sept. 4 & 5, 1980), at 61-101 (testimony of William E. Fowler, Jr., William J. O'Brien, Reuben Lozner, Ernest G. Barnes, and William Fauver) [hereafter cited as ALJ Hearings].

[45] FINAL REPORT, supra note 29, at 46.

The ALJs also have asserted the undesirability of agency control over ALJ selection, especially opposing the device of "selective certification" which allows agencies to add to the requirements for ALJ appointment generally used by the Office of Personnel Management.[46] A typical additional requirement is the Federal Communications Commission's insistence that its ALJs before appointment have at least two years experience in the preparation, presentation, or hearing of formal cases in communications law.[47] Such criteria are criticized as biasing selection in favor of agency employees and, by implication, as giving the official selecting among ALJ candidates too much control over the selection.[48] The ALJs support the basic ALJ slection process that limits agency involvement to a choice among three persons picked by the Office of Personnel Managemant on the basis of its criteria, which are unrelated to the subject matters that may come before an ALJ or the interests of the employing agency.[49]

Acceptance of the judicial model in its pristine form is consistent with some positions taken by non-ALJs as well. Decisions of the Supreme Court respecting damage liability in civil suits, for example, appear to be consistent with acceptance of the judicial model of ALJs' operation. The Court has found judges absolutely immune from damage liability for the performance of their judicial duties but has provided executive officers below the President -- including Cabinet officers and presidential aides -- only a "qualified immunity" that may offer considerably less protection to those officials.[50] The Court has held squarely that ALJs are to be viewed as judges for liability purposes, drawing no distinction among ALJs or the types of cases before them.[51] Actions of officials at the U.S. Civil Service Commission, the predecessor agency to OPM, also have been in keeping with the judicial model. The Commission was charged with evaluation of the proper level and range of ratings for ALJs, and over a period of years, it consistently adjusted ratings so that they increased in rank and compressed in range.[52] Excepting chief ALJs, all administrative law judges are either GS-15 or GS-16;[53] in only two agencies do some ALJs occupy each grade; and at all but four of the remaining agencies the grade occupied by all ALJs is GS-16.[54] The impact of higher grade levels and fewer gradations is reduction in ALJ incentives to decide cases in a fashion that will permit advancement, since for ALJs, like federal judges, opportunity for advancement is slight.[55]

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[46] E.g., ALJ Hearings, supra note 44, at 74 (statement of William Fauver on behalf of the Administrative Law Judges' Conference).

[47] See Lubbers, supra note 1, at 117.

[48] See, Davis, supra note 13, at 402-406; Miller, The Vice of Selective Certification in the Appointment of Hearing Examiners, 20 AD. L. REV. 477 (1968).

[49] ALJ Hearings, supra note 44, at 74; see 5 C.F.R. § 930.203 (1981).

The judicial view of ALJs and agency adjudication has not gone unchallenged. Professor (now Judge) Scalia, for example, has argued that administrative adjudication should be considered in the context of overall agency decisionmaking.[56] Viewing the former as governed by the judicial model and the latter by the political model leads to incompatible decisions -- the ALJ cannot resolve questions of descriptive fact without any impact on agency policy since the two sorts of decision cannot easily be separated and examination of the matters subject to ALJ decision (e.g., the rates charged for various services by AT & T) in any event belies the fiction of policy-neutral decisionmaking.[57] Scalia urges that ALJs be treated like any other employee, letting the agency policymakers decide what issues to entrust to ALJs and what issues to pass on to others.[58] The present structure of agency personnel hampers what Scalia sees as a sensible recognition that all agency determinations ultimately must be governed by the political decisions of the agency head and other high-ranking policymakers. The limited provision for ALJ advancement, and the even more limited role for control of ALJ assignments and pay, frustrates efforts to shape ALJs' decisions in accord with policymakers' desires and at the same time, since ALJs in several agencies account for more than half of the statutorily restricted number of "super grade" positions, decreases agency heads' ability to attract and retain capable policymaking personnel.[59] Scalia applauds selective certification as a useful if modest step toward integration of ALJs into the agencies for which they work, but finds it far from enough.[60]

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[50] Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982); Butz v. Economou, 438 U.S. 478 (1978). The Court recently decided that the President, like ALJs, enjoys absolute immunity from damage liability for official conduct. Nixon v. Fitzgerald, 102 S.Ct. 2690 (1982). Although the Court was unanimous in finding ALJs absolutely immunized, four justices thought the President should not be so broadly protected, a veiw consonant with that of lower courts. See Halperin v. Kissinger, 6506 F.2d 1192 (D.C. Cir. 1979), aff'd by an equally divided Court, 452 U.S. 713 (1981); Clark v. United States, 481 F. Supp. 1086 (S.D. N.Y. 1979), appeal dismissed, 624 F.2d 3 (3d Cir. 1980).

[51] Butz v. Economou, 438 U.S. 478 (1978).

[52] See Scalia, supra note 19, at 65-68.

[53] See Lubbers, supra note 1, at 112-13; Scalia, supra note 19, at 68-69.

[54] See Lubbers, supra note 1, at 112-13; Scalia, supra note 18, at 62-63. GS-15 ALJs are employed by the Coast Guard, Department of Housing and Urban Development, Internal Revenue Service, and the Social Security Administration. Both GS-15 and GS-16 ALJs are employed by the Department of the Interior and the Department of Labor.

[55] See Scalia, supra note 19; see also Macy, The APA and the Hearing Examiner: Products of a Viable Political Society, 27 FED. B. J. 351, 355 (1967).

To the extent ALJ decisions do involve matters other than disputes over descriptive facts, the failure to integrate ALJs into the agency decisionmaking apparatus has two serious drawbacks. First, divergent views of what policies should be pursued will lead to increased time and cost in the administrative litigation and review process. The ALJ may believe one policy is being followed by the agency for which he works. If a different policy is favored by the agency head, some ALJ decisions may be reversed that would have been fashioned differently (and affirmed) had the policy been understood by the ALJ; or the policy differences may go unresolved for some time, thus impeding accomplishment of the agency head's objective and confusing persons who must deal with the agency.[61] Second, the existence

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56. Scalia, supra note 19; see also Pops, supra note 8, at 197-203.

57. Scalia, supra note 19, at 75.

58. Id. at 62, 78.

59. See generally id.

60. Id. at 73-75.

61. See FINAL REPORT, supra note 29, at 57-58.

of a group within an agency insulated from agency policy decisionmaking processes encourages use of alternative routes for policy making and implementation. Other things being equal, the agency head should prefer to channel resources away from ALJs and adjudicative processes that must involve ALJs, substituting in their stead more malleable proceedings that are more easily supervised by the agency head.[62] In large measure, the separateness of ALJs within the agency perpetuates a two-tier administrative process, making it more difficult to find ways of combining aspects of adjudication and rulemaking in the manner best suited to resolution of each type of controversy.[63] Moreover, in instances where problems are tackled by rulemaking although there are serious factual disputes as to which parties could contribute a considerable amount of useful information, the decision reached may be less desirable perhaps than one reached through a case-by-case process. Although recently some statutes have specifically authorized ALJ participation in rulemaking proceedings,[64] such participation is both exceptional and severely limited in scope.

If the separation of officials who do not merely find descriptive facts presents difficulties for the agency operation, explicating the basis for a system that produces neither complete ALJ independence nor complete integration is critical. Putting aside a compromise between incompatible notions of agency operations -- perhaps the true explanation, but of little use -- for all who advocate some half-way house between the two polar views it is necessary to articulate the purposes of insulating ALJs and the concerns that preclude their complete insulation. The factors may, and probably do, affect administrative adjudication far from uniformly, dictating far greater independence of adjudication from policy-making in some cases than in others.

The Attorney General's Committee indicated that fear of factual prejudgment in cases where agencies acted both as prosecutors and adjudicators to enforce statutory or regulatory commands was the principal motivation in separating ALJs from agency control.[65] Agencies engaged in licensing,[66] in resolution of essentially private disputes,[67] or in benefits administration,[68] rather than in enforcement activity, might exercise considerable power over ALJs and agency adjuciations without triggering that concern. It is by no means clear, however, that others believe factual prejudgment is the critical factor in determining the appropriate locus and extent of inquiry into ALJs' actions. The congressional committees that considered the APA did not identify the factors they thought controlled the shape of agency adjudication, but they did reject some proposals of the Attorney General's Committee as insufficiently insulating ALJs from agency influence.[69]

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[62] This desire would follow from almost any hypothesis as to how administrators behave. See generally A. DOWNS, INSIDE BUREAUCRACY (1967); W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); Posner, The Behavior of Administrative Agencies, 1 J. LEGAL STUD. 305 (1972).

[63] See Pops, supra note 8; see also Williams, "Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401 (1975).

[64] E.g., Magnuson-Moss Act, 15 U.S.C. § 572 (1976); Occupational Safety and Health Act, 29 U.S.C. § 655(b)(3) (1976).

C. Control of Adjudication: The Role of Review

The tension between the judicial and political models in tandem with the absence of a consensus that one should and the other should not completely govern administrative adjudication (much less consensus on some intermediate position) frustrates attempts to design easily implemented, logically consistent decision-making structures. Either polar view, of course, can be satisfied. The problems seen by wholehearted adherents of the judicial model can be addressed by making ALJs and their decisions wholly independent of control by others. In a similar vein, one solution to the problems perceived by Scalia and others who find the judicial model an inappropriate guide for ALJ decisionmaking would be abolition of the class of ALJs as presently constituted. Rather than a statute-based class of semi-insulated hearing officers, ALJs' duties would be performed by agency employees of whatever level, background, and organizational affiliation the supervising officials deemed appropriate to the particular case or issue.[70] Hearing officers then might well occupy a considerable variety of GS grades; some might come from backgrounds that did not involve extensive experience in administrative litigation; and they might be located in a number of different departments, perhaps a separate hearing officer bureau, perhaps under the aegis of the agency's General Counsel, perhaps attacked to bureaus charged with substantive regulation. Hearing officers, as ordinary agency employees, might even perform other functions -- the hearing officer in a major FCC rate hearing, for instance, might be a legal assistant to the Commission chairman, a member of the General Counsel's staff, or a deputy to the Chief of the Common Carrier Bureau. While the present system inevitably treats ALJs the same in nearly all respects regardless of differences in the nature of the cases they hear, the missions of the agency for which they work, or the interests and identities of parties before them, integrating them into the agencies would allow their pay, working conditions, and so on, to be tailored to reflect (at least some of) the myriad factors that distinguish one ALJ from another.

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[65] See FINAL REPORT, supra note 29, at 58-60.

[66] E.g., Federal Communications Commission (FCC).

[67] E.g., National Labor Relations Board (NLRB).

[68] E.g., Social Security Administration (SSA).

[69] The Attorney General's Committee, for instance, had proposed appointment of ALJs for seven-year terms rather than the indefinite term with protection against removal chosen by Congress. See FINAL REPORT, supra note 29, at 47-48.

The limits to this solution, however, illustrate the difficulty of identifying the appropriate manner and measure of review for ALJ decisions: a general problem of large organizations, especially true for governmental enterprises, is how to secure the appropriate behavior by employees.[71] This problem applies even to acts of "ordinary" employees (not subject to the special strictures preventing agency control over ALJs).[72] Making hearing officers as independent of, or as subject to, supervising employees as the agency head chooses and as the civil service laws allow would probably be more efficient (a term explored in greater detail *infra* in Part III), but it would not ensure that all agency decisions are made in accord with the agency head's wishes. Focusing on the characteristic of subordinates' decisions that may be most likely to diverge, there is, for instance, no guarantee that decisions by subordinates who are in theory fully subject to the agency head's control will conform to a single policy view. Apart from the policy variation that must be experienced over time with changed circumstances and different leadership, there is bound to be some difference in agency decisions. So long as all decisions cannot be made by a single individual, disparate perceptions of what agency policy is and should be -- as well as divergent interpretations and assumptions on a host of subsidiary matters that inform policy -- promote differences among the decisions.

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[70] While this solution would meet the objections of those who have been most critical of the organization of agency adjudication increasingly along lines of the judicial model, no one seriously advances this as a possibility for more than a few "rare" cases. *See generally* COMPTROLLER GENERAL OF THE U.S., ADMINISTRATIVE LEGAL PROCEDURE: BETTER MANAGEMENT IS NEEDED (1978); Boyer, *supra* note 23; Pops, *supra* note 8; Robinson, *supra* note 23; Scalia, *supra* note 19.

[71] *See, e.g.*, K. ARROW, *Control in Large Organizations*, in ESSAYS IN THE THEORY OF RISK-BEARING 223 (1971); J. GREEN & J. LAFFONT, INCENTIVES IN PUBLIC DECISIONMAKING (1979); Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1160-79 (1981); Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55 (1979).

[72] *See, e.g.*, Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Holmström, *Moral Hazard and Observability*, 10 Bell J. ECON. 74 (1979).

These differences can be reduced by efforts to attract people whose views closely approximate those of the agency head, or whose interests closely parallel those of the agency head. Finding people whose views closely match yours is not easy,[73] nor is it simple to give people incentives correctly to identify and fully to implement your views, in part simply because of difficulties *ex ante* in articulating (indeed, arriving at) your views on every relevant subject. Investment in making decisions and spelling out rules to guide subordinates is, of course, useful for securing conforming behavior but, as with the investment in identifying compatible employees or structuring employees' incentives to compatibility, may be costly if it is to have significant effect.

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[73] The divergence of individuals' beliefs and preferences follows almost axiomatically from the concept of rational, self-interested behavior, since what benefits one individual almost never will benefit another to just the same extent. Individuals can, of course, share preferences that are extremely similar in some respects or can identify activity that satisfies disparate preferences. Even where smoothly functioning markets exist, however, only limited information about others' preferences is revealed. *See* Alchian, *The Meaning of Utility Measurement*, 43 AM. ECON. REV. 26 (1953); Friedman, *The Methodology of Positive Economics*, in M. FRIEDMAN, ESSAYS IN POSITIVE ECONOMICS 3 (1953); Waldner, *The Empirical Meaningfulness of Interpersonal Utility Comparisons*, 4 J. PHIL. 87 (1972). Extensive literatures have developed attempting to interpret the choices people make so as to identify underlying preferences and to construct decisionmaking processes that will reveal preferences. *See, e.g.*, S. BRAMS & F. FISHBURN, APPROVAL VOTING (1983); D. MUELLER, PUBLIC CHOICE (1979); W. RIKER & P. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY (1973); Simon, *On How to Decide What to Do*, 9 BELL J. ECON. 494 (1978). One point that emerges clearly is the difficulty of securing information about others' beliefs and shaping joint efforts to harmonize differences. *Cf*. K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963) [a general treatment of the desirability and difficulty of shaping joint decisionmaking in this fashion]. Everyday examples of the result of these difficulties abound, witness the surprise experienced by President Dwight Eisenhower when [some of] the actual preferences of Earl Warren were made clear[er] *after* his appointment to the Supreme Court or President Richard Nixon's similar dismay at the views in fact held by Miles Kirkpatrick, not surmised until *after* his appointment to head the Federal Trade Commission.

A second mechanism for reducing the disparity in agency decisions is to review subordinates' decisions.[74] This is in fact a large part of what makes the first mechanism work, since absent some form of review it is difficult to reward conforming behavior or punish behavior that departs from your wishes, the stuff incentives are made of.[75] Despite the significance of review, this plainly is a costly means to uniformity, imposing especially on the agency head's time. In structuring the agency's decisions, then, the agency head will be required to balance the requisite investment of resources against the importance of suiting his views on a given issue. Decision both as to the selection of personnel and the use of review will turn on this balance. Thus, agency heads, where they are free to do so, presumably entrust important decisions to individuals in whom they repose great trust, and in the case of truly important decisions the agency heads also become personally involved, while less important decisions are entrusted to employees who may reflect the agency heads' view less closely, and truly unimportant decisions are made with finality by such employees.

Review in the normal course is complementary to job controls (controls over employees' appointment, work assignment, pay, promotion, tenure, and so on), although it also constitutes an independent control over subordinate employees.[76] Without the related controls over the structure and rewards of the job, review guards against adverse impact from acts of subordinates.[77] Moreover, dislike of reversal, a subset of our general dislike of criticism, may prove some incentive for subordinates to modify their conduct in a fashion desired by the reviewer.[78] Obviously, however, review is apt to be its most effective when attached to the full complement of job controls. That nexus allows it in important ways to affect performance incentives as well as the effect of decisions already made.[79]

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[74] *See*, *e.g.*, Alchian & Demsets, *supra* note 72; Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FINANCIAL ECON. 305 (1976).

[75] *See* Alchian & Demsetz, *supra* note 72; *see also* McKean, *Property Rights Within Government and Devices to Increase Governmental Efficiency*, 39 S. ECON. J. 177 (1972).

[76] *See* Holmström, *supra* note 72; Stiglitz, *Incentives, Risk, and Information: Notes Toward a Theory of Hierarchy*, 6 BELL J. ECON. 552 (1975).

If supervisors with the full panoply of controls must make difficult determinations concerning what decisions to delegate to which subordinates -- and along with that, how much to invest in selecting subordinates, in spelling out decision standards, and in policing subordinates' decisions -- taking the APA's current provisions as a given presents more difficult choices on a narrower range of issues. In the adjudication context, supervisors must decide what review function to exercise or to delegate, how much to spell policies out in advance, and how much to defer to the initial decisionmaker, but they seldom need decide who should preside over hearings, how to select those employees, and what sort of job controls to exercise.[80] For those commentators who accept (as a political reality or theoretical desideratum) the uneasy compromise of adjudication by ALJs inside but separate from agencies, rather than advocating total ALJ independence or total agency control, the remaining questions are what sort of job controls, if any, are in order, and what sort of agency review is appropriate.

A number of proposals for altering review of ALJs' performance have been put forward. Many have called for increased scrutiny of ALJ decisions in a fashion that might provide greater job controls without an increase in political input of the magnitude that necessarily would accompany integration of ALJs into agencies.[81] The Comptroller General, for example, in a 1978 report to Congress concluded that additional review of ALJs is required to identify and correct unsatisfactory ALJ performance.[82] Yet the Comptroller also concluded that agency review of ALJ decisions was a cause of increased cost and delay in agency adjudications and recommended a reduction in intra-agency review of specific ALJ Decisions.[83] In place of such agency review, the Comptroller advocated that the Civil Service Commission (or some similar agency), be appointed to supervise ALJ decisionmaking, measuring ALJs' performance against both quantitative and qualitative standards.[84] In a similar vein, a bill introduced in the 96th Congress would have entrusted review of ALJ performance to the Administrative Conference.[85] In reporting out the bill, the House of Representatives' Committee on Post Office and Civil Service said that it was "providing, for the first time since enactment of the Administrative Procedure Act, a system for periodic appraisal of, and disposition of complaints about, administrative law judge performance."[86] This bill was not enacted into law in the 96th Congress, but similar measures for external evaluation are certain to be put forward in the future.

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[77] Cf. FINAL REPORT, supra note 29, at 76-79 (respecting role of judicial review).

[78] See, e.g., Cass, First Amendment Access to Government Facilities, 65 VA. L. REV. 1287, 1329 n.207 (1979); see also C. HORSKY, THE WASHINGTON LAWYER 78 (1952).

[79] The absence of such a connection may explain some of the difficulty commentators experience in attempting to determine what motivates judges. See, e.g., R. POSNER, ECONOMIC ANALYSIS OF LAW 415-17 (2d ed. 1977).

[80] These matters are, generally, removed from their discretion. See 5 U.S.C. §§ 556, 557, 3105, 5372, 7521 (1976).

Proposals for review outside the employing agency, external review, represent at least a partial rejection of the judicial model of ALJ action. Unless the review is limited to examination of the ALJ's diligence without regard for the consonance of his decisions with agency policies, the external review necessarily increases the impact of political decisionmaking on agency adjudication. By tying the review to job controls, the process raises ALJ's incentives to conform to agency policymakers' views.[87] Plainly, the mixing of political and judicial models comes in many gradations, and external review could provide the most minimal political input. One who accepts the judicial model of agency adjudication might embrace external review as a check on misfeasance or nonfeasance but advocate that the review go no further than guarding against serious departures from clearly articulated agency policy.[88] The external review, in other words, might use a standard for qualitative review similar to the clearly erroneous standard for appellate court review of trial judges' factfinding. Requiring agency policymakers to spell policies out in advance in a fashion that makes the policy clear to others grants far less scope to the political factors than does allowing agency policymakers to reverse ALJ decisions at will. There is some logical basis, thus, for the Comptroller General's recommendation that external review be increased and internal review decreased.

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[81] *See*, *e.g.*, COMPTROLLER GENERAL, *supra* note 70; MASHAW, GOETZ, GOODMAN, SCHWARTZ, VERKUIL & CARROW, SOCIAL SECURITY ADMINISTRATION DISABILITY HEARING SYSTEM (1978); Chassman & Rolston, *Social Security Disability Hearings: A Case Study in Quality Assurance and Due Process*, 65 CORNELL L. REV. 801 (1980); *but see* Mashaw, *How Much of What Quality? A Comment on Conscientious Procedural Design*, 65 CORNELL L. REV. 823 (1980).

[82] COMPTROLLER GENERAL, *supra* note 70.

[83] *Id*. at v-vii.

[84] *Id*.

[85] H.R. 6768, 96th Cong. 2d Sess. (1980).

[86] H.R. Rep. No. 1186, House Comm. on Post Office and Civil Service, 96th Cong., 2d Sess. 15 (1980).

Still, proposals for review of ALJ decisions on non-quantitative grounds,[89] and for the use of job controls to alter ALJ's decisionmaking incentives[90] are to some degree in conflict with the judicial model of agency adjudication. And as one moves away from that model it is difficult to support the location of job controls outside the agency rather than within. Surely if external review is designed to see that ALJ decisions conform to agency policies, that is a job the agencies are better situated to perform. The policymaking officials within the agency, after all, set those policies and better than any other

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87. See authorities cited at notes 71-79 supra.

88. This approach is not dissimilar to that suggested by some for assessing the propriety of judicial performance in the context of damage suits, see, e.g., Stump v. Sparkman, 435 U.S. 349 (1978), at 364-69 (Stewart, J., dissenting), 369-70 (Powell, J., dissenting).

89. E.g., COMPTROLLER GENERAL, supra note 70. Some discussions of ALJ performance have focused less on the quality of ALJ decisions than on the disparity among ALJs in any given agency in number of decisions issued, a matter more easily policed without affecting decision incentives so directly.

90. E.g., Scalia, supra note 19.

official can interpret and identify deviations from them.[91]

While intra-agency review is useful, and is widely used, to guard against adverse effects of subordinates' decisions, however, it also has the potential to introduce new problems. In part, this is because resources must be used in review, and it always is an open question whether they are being used wisely. Choosing how to review ALJ actions requires decisions on several subsidiary issues: the review may be searching or pro forma; it may be readily available or granted only in special cases; the reviewer may be by an individual or a group; and the review may consist of a single review or multiple levels. For each of these choices, the cost of that particular sort of review may be assailed as too high and its benefits as too low, although the removal of job controls from agency supervisors' hands (rightly or wrongly) limits alternatives for shaping ALJs' behavior. Finally, just as preferences for some variant of the judicial or the political model inform most discussion of agency action, they also provide additional grounds for criticism of agency review as allowing, respectively, too little or too much leeway to judgments of officials divorced from the apparatus more explicitly concerned with agency policymaking.[92]

II. ACUS Recommendation 68-6

A. Genesis

Concern over the manner in which agencies reviewed ALJ decisions led the Administrative Conference of the United States

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[91] The relation of adjudicatory decisions to statutory mandate, as opposed to administrative policy, may not be seen as so plainly a matter within agency policymakers' peculiar competence. See, e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (declaring need for judicial scrutiny of agency action to assure constancy with statutory design). At the same time, there is little reason to suppose that another administrator is better suited to make that judgment. Cf. NLRB v. Hearst Publications, 322 U.S. 111 (1944) (Congress intended to leave interpretation of statutory term to agency charged with statute's effectuation); Landes & Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J. L. & ECON. 875 (1975) (courts, outside the relatively direct influence of political actors, serve better to interpret meaning of statutes according to intent of those critical to their enactment).

[92] See Cramton, A Title Change for Federal Hearing Examiners? "A Rose By Any Other Name . . ., 40 GEO. WASH. L. REV. 918 (1972); Davis, supra note 13; Pops, supra note 8; Scalia, supra note 19.

(hereafter ACUS or the Conference) to commission a study of ALJ review in the late 1960's. The resulting reports, by Professor James Freedman and by Emory Ellis, then Executive Secretary to the Conference, spurred adoption of ACUS Recommendation 68-6 in 1968. This Part examines the origin and impact of 68-6.

Professor Freedman's report found two principal difficulties with agency review of ALJ decisions. One objection focused on the impact such review had on the particular parties involved in disputes subject to ALJ decisionmaking, while the other complaint dealt with the implications of the generally used review process for agency policymaking. The first complaint was that the decision of adjudicatory proceedings had become a lengthy affair.[93] Freedman referred to the untoward length of adjudicatory proceedings as the problem of "delay," the same term earlier used by Dean Landis.[94] There are two components to delay: the length of time taken to resolve a proceeding and the number of days during the proceeding in which participation by theparties, or their surrogates is required. Although increases in either component of delay impose some costs on litigants before agencies, the costs are not the same. An increase in the "active" part of the proceeding imposes monetary costs of participation directly on the parties involved. An increase in the part of the proceeding during which parties are "passive" (including time during which there may be no activity by anyone, the "warehousing" or "queuing" time spent waiting for the proceeding to advance in line at any stage) does not have this effect; but since it also lengthens the time during which litigants are uncertain about the outcome, it, too, impairs litigants' abilities to plan their affairs.

Increases in both the time and costliness of agency decisions put pressure on some putative litigants to find means of avoiding agency adjudications. This last factor, the settlement impetus of long and costly proceedings, does not affect litigants equally. Some are in a much better position than others to cope with the costliness and uncertainty of long proceedings and longer agency decision time. Someone who during the pendency of a proceeding is receiving benefits that the decision might terminate, for instance, is apt to be much less bothered by the lengthiness of the proceeding than someone whose benefits commence only after a favorable decision. Similarly, a party with a great stake in the outcome will be much more burdened by delay than a party with a relatively slight stake (contrast a business seeking a licence to operate with a challenger to the license). Inequality of the effects of delay probably translates into a pattern of settlements more favorable to some parties and less favorable to others than agency decisions would be.[95] Thus, the longer and costlier the agency adjudicatory process, the greater the amount of activity shaped not by the agency's substantive rules, but by the settlement process that only in part reflects those rules.[96]

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[93] Report of the Committee on Agency Organization and Procedure in Support of Intermediate Appellate Boards; Subparagraph 1(a) of Recommendation No. 6, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, REPORTS AND RECOMMENDATIONS 125 (1968) [hereafter Freedman Report].

[94] Id. at 125-26, relying on J. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 5 (1960).

The second complaint noted by Freedman was that agency adjudication did not reflect coherent policies.[97] Decisions lacked predictability, and the reasons for them were often unclear.[98] The failure of agencies to formulate policies broadly and follow them consistently does not have a single simple explanation. Rather, this failure must be understood as the product of a variety of reasons related to the nature of large bureaucracies handling complex problems of interest to different parties.[99] The agency seldom will have a well-defined, easily applied mandate from the legislature, often because the legislature could not agree on concrete goals for the agency.[100] Groups with divergent interests will seek to influence the agency's decisions, and the manner and magnitude ofeach interest's efforts will vary from decision to decision.[101] Even if all parties were agreed on the appropriate goals -- a rarity in agency decisionmaking -- the problem confronted by the agency may pose issues beyond our current capacity to address and resolve.[102] Indeed, such limits to our processes of ratiocination underlie much of the increased dissatisfaction with government regulation.[103] As the information available to agency decisionmakers changes (with changing factual settings, increased information from research, or different inputs from affected parties) and as the political forces alter the composition of agency leadership and the perception of agency priorities, it is natural that agency policies will change. Agencies start, thus, with several important impediments to the formulation of coherent policies.

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[95] The situation described here has analogies in many other areas, including for instance litigation arising out of automobile accidents. See H. ROSS, SETTLED OUT OF COURT 233-43 (1970); Bombaugh, The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform, 71 COLUM. L. REV. 207, 214, Table 3 (1971).

[96] For an analogous discussion in the area of "plea bargaining" in criminal cases, see Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication, 78 MICH. L. REV. 463, 507-39 (1980).

[97] Freedman Report, supra note 93 at 125, 126-27.

[98] This complaint has been voiced by a host of commentators. See, e.g., H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962); Robinson, supra note 23.

[99] See generally, K. ARROW, supra note 71; R. CYERT & J. MARCH, A BBEHAVIORAL THEORY OF THE FIRM (1963), J. MARCH & H. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISIONMAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS (1976); J. THOMPSON, ORGANIZATIONS IN ACTION (1967).

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[100] See, e.g., Aranson, Gellhorn & Robinson, A Theory of Legislative Delegation (Sept. 1982, on file with author); see also Fiorina, Legislative Choice of Regulatory Form: Legal Process or Administrative Process?, 39 PUBLIC CHOICE 33 (1982); Jaffe, supra note 7. The art of ambiguity is one mechanism for surmounting difficulties of harmonizing divergent individual values. The best-known discussion of this subject is K. ARROW, supra note 73, at 46-73. Cogent discussions of these difficulties also include A. FELDMAN, WELFARE ECONOMICS AND SOCIAL CHOICE THEORY 138-95 (1980); A. MacKAY, ARROW'S THEOREM: THE PARADOX OF SOCIAL CHOICE (1980); A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970).

[101] See, e.g., R. CASS, REVOLUTION IN THE WASTELAND: VALUE AND DIVERSITY IN TELEVISION 37-55 (1981); Cutler and Johnson, Regulaton and the Political Process, 84 YALE L.J. 1395 (1975); Lazarus & Onek, The Regulators and the People, 57 VA. L. REV. 1069 (1971); Peltzman, Toward a More General Theory of Regulation, 19 J. L. & ECON. 211 (1976); Robinson, supra note 7; Stigler, The Theory of Economic Regulation, 2 BELL J. ECON. & MGT. SCI. 3 (1971).

Moreover, even were they operating in a static world with fixed, agreed-upon goals and constant positions espoused by politicians and other parties, agency decisionmakers might not always find it worthwhile to formulate broad policies. There are costs to creation of general rules, granting our competence to make them. It might be inefficient to attempt broad prescriptions in preference to ad hoc adjudication once general goals are

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102. The difficulties of decisionmaking operate at two levels: first, there are impediments to an individual's projecting what course of action will satisfy best his own interest; second, there are additional impediments to a social planner's determination of a course of action that will be in society's best interest. At both levels, problems of gathering, evaluating, and assimilating information are involved; at the secondary (planning) level the problems concern identifying individuals' preferences as well as determining the strategy that will optimize them. This last difficulty is complicated by the difficulty of aggregating individual preferences, see authorities cited supra at notes 73 and 100. The overarching difficulty of comprehensive decisionmaking in complex situations, which has come to be known as the problem of "bounded rationality" is discussed in Simon, A Behavioral Model of Rational Choice, 69 Q. J. ECON. 99 (1955). A further elaboration of this and subsidiary problems, including some relating to individul prediction of one's own preferences, in March, Bounded Rationality, Ambiguity, and the Engineering of Choice, 9 BELL J. ECON. 587 (1978). The implications of this problem, at least at its secondary level, are implicit in M. FRIEDMAN, CAPITALISM AND FREEDOM (1962), and explicit in Diver, Policymaking Paradigms in Administrative Law, 95 HARV. L. REV. 393 (1981).

103. An amusing as well as enlightening discussion of government misthinking is B. ACKERMAN & J. HASSLER, CLEAN COAL, DIRTY AIR (1981). Less light-hearted but equally critical is Peltzman, An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments, 81 J. POL. ECON. 1049 (1973).

adopted.[104] The latter may give the appearance ofunpredictability but may track agency goals more closely than a fuller ex ante description of agency policy, especially where the policy must be applied to a wide variety of different situations.[105] It well may be the case that a comprehensive rule would either produce the wrong result (judged by the agency's goals) in many instances or be subject to frequent exceptions, in which case the rule in practice takes on the same form as ad hoc adjudication.

Finally, assuming agreement among citizens, legislators, and agency heads on the goals to be pursued by the agency, and further assuming agency interest in and competence to translate those goals into coherent statements of policy, agency action still might not appear consistently to advance comprehensible policies. To the extent agency leaders must delegate tasks to subordinates (including the tasks of information-gathering and evaluation, as well as decisionmaking that is more plainly policy-linked), consistency will diminish. Each person within an agency has some interests that are not fully shared by other agency personnel.[106] It is costly to monitor employee behavior, and nonprofit, governmental bureaucracies seem to lack other means available to private firms for making individual employees' interests conform more closely to the enterprise's interest.[107]

Professor Freedman did not detail all the costs and causes of the two principal problems of agency adjudication on which he focused. He did, however, write with an awareness that neither the causes nor the effects of these complaints were simple.[108] And he plainly appreciated, as did the Conference, that no simple solution could eliminate the complaints.[109] Still, he believed that progress in alleviating both problems could be made by relatively small changes in agency review of adjudicatory decisions. In brief, he proposed reducing the review burden on agency heads in order both to decrease the time necessary for review (ameliorating the delay problem) and to increase the personal participation of agency heads in cases they did review (thus increasing the likelihood that high-level agency review would be used to shape policy).[110] The specific means suggested for reducing agency heads' review burden were (1) permitting review of ALJ decisions at the discretion of the agency (using that term to mean the head of an agency or members of a multimember commission) with unreviewed decisions becoming final agency action, and (2) establishing appellate review boards intermediate between the ALJ and agency head.[111]

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[104] See Ehrlich & Posner, An Economic Analysis of Legal Rulemaking, 3 J. LEGAL STUD. 257 (1974).

[105] Id.; See also Diver, Optimal Precision of Administrative Rules, 93 YALE L.J. 65 (1983).

[106] See, e.g., J. GREEN & J. LAFFONT, supra note 71; Jensen & Meckling, supra note 74; McKean, supra note 75.

[107] See Cass, supra note 71, at 1164-74. The mechanisms for reduction of the impact of "moral hazard" (the opportunity to indulge in individual self-interest at others' expense) in private, profit-oriented firms are discussed in Fama, supra note 75; Holmström, supra note 72; Jensen & Meckling, supra note 75; Stiglitz, supra note 71.

[108] Freedman Report, supra note 93 at 125-26.

[109] Id. at 150-54.

At the time Professor Freedman wrote, three agencies had, pursuant to enabling legislation, adopted such procedures. The Civil Aeronautics Board (CAB) had provided for review of ALJ decisions in the Board's discretion, while intermediate appellate review boards had been established at the Federal Communications Commission (FCC) and the Interstate Commerce Commission (ICC). In nearly all other federal agencies, ALJs rendered initial decisions that routinely were reviewed by agency heads.[112] The reports by Freedman and Ellis declared that discretionary review at the CAB and the use of intermediate review boards at the FCC and ICC seemed to have reduced the average time for decision at those agencies.[113] Freedman and Ellis also reported that persons who worked with these agencies generally were pleased with the results of the new decisionmaking processes. They felt that the agencies produced better reasoned opinions that were more predictable. Freedman noted that, with respect to the FCC's Review Board, the praise perhaps should be qualified because the Board was given a relatively narrow range of inquiry and, hence, should be expected to act more quickly and consistently.[114] Nonetheless, he credited as significant to improving the quality of opinion writing the assignment of opinion-writing responsibility to individual board members (who, like judges, signed the opinions) and the greater direct involvement of the Review Board members (as opposed to Commissioners) in review and evaluation of each case.[115] In light of these findings, the Conference adopted ACUS Recommendation 68-6, Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency:

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[110] Id. at 134-37.

[111] Id. at 136-37.

[112] Freedman did not discuss instances in which the review function was delegated to an individual agency employee, as in the Judicial Officer programs at the Post Office Department (now the U.S. Postal Service) and the Department of Agriculture. Few agencies, however, use this process. See discussion in Part III, infra.

[113] Freedman Report, supra note 93 at 137; Report in Support of Discretionary Review of Decisions of Presiding Officers; Subparagraph 1(b) of Recommendation No. 6, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, REPORTS AND RECOMMENDATIONS 155, 160-63 (1968) [hereafter Ellis Report].

> 1. In order to make more efficient use of the time and energies of agency members and their staffs, to improve the quality of decisions without sacrificing procedural fairness, and to help eliminate delay in the administrative process, every agency having a substantial caseload of formal adjudications should consider the establishment of one or more intermediate appellate boards or the adoption of procedures for according administrative finality to presiding officers' decisions, with discretionary authority in the agency to affirm summarily or to review, in whole or in part, the decisions of such boards or officers.
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> 2. Section 8 of the Administrative Procedure Act, 5 U.S.C. §557, should be amended as necessary to clarify the authority of agencies to restructure their decisional processes along either of the following lines:
>
> (a) Intermediate appellate boards
>
> (1) Whenever an agency deems it appropriate for the efficient and orderly conduct of its business, it may, by rule or order:
>
>> (a) Establish one or more intermediate appellate boards consisting of agency employees qualified by training, experience, and competence to perform review functions,
>>
>> (b) Authorize these boards to perform functions in connection with the disposition of cases of the same character as those which may be performed by the agency,

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[114] *Freedman Report*, *supra* note 93, at 131.

[115] *Freedman Report*, *supra* note 93, at 131-33.

(c) Prescribe procedures for review of subordinate decisions by such boards or by the agency, and

(d) Restrict the scope of inquiry by such boards and by the agency in any review, without impairing the authority of the agency in any case to decide on its own motion any question of procedure, fact, law, policy, or discretion as fully as if it were making the intitial decision.

(2) Any order or decision of an intermediate appellate board, unless reviewed by the agency, shall have the same force and effect and shall be made, evidenced, and enforced in the same manner as orders and decisions of the agency.

(3) A party aggrieved by an order of such board may file an application for review with the agency within such time and in such manner as the agency shall prescribe, and every such application shall be passed upon by the agency.

(4) In passing upon such application for review, an agency may grant, in whole or in part, or deny the application without specifying any reasons therefor. No such application shall rely upon questions of fact or law upon which the intermediate appellate board has not been afforded an opportunity to pass.

(5) An agency, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or other action made or taken by an intermediate appellate board.

(6) If an agency grants an application for review or undertakes review on its own motion, it may affirm, modify, reverse, or set aside the order, decision, report or other action of the intermediate appellate board, or may remand the proceeding for consideration.

(7) The filing of an application for agency review shall be a condition precedent to judicial review of any order of an intermediate appellate board.

(8) Agency employees performing review functions shall not be responsible to or subject to the supervision or direction of any employee or agent engaged in the performance of investigative or prosecuting functions for any agency.

(b) Discretionary review of decisions of officers

(1) When a party to a proceeding seeks administrative review of an initial decision rendered by the presiding officer (or other officer authorized by law to make such decision), the agency may accord administrative finality to the initial decision by denying the petition for its review, or by summarily affirming the initial decision, unless the party seeking review makes a reasonable showing that:

(a) A prejudicial procedural error was committed in the conduct of the proceeding, or

(b) The initial decision embodies (i) a finding or conclusion of material fact which is erroneous or clearly erroneous, as the agency may by rule provide; (ii) a legal conclusion which is erroneous; or (iii) an exercise of discretion or decision of law or policy which is important and which the agency should review.

(2) The agency's decision to accord or not to accord administrative finality to an initial decision shall not be subject to judicial review. If the initial decision becomes the decision of the agency, however, because it is summarily affirmed by the agency or because the petition for its review is denied, such decision of the agency will be subject to judicial review in accordance with established law.

B. Implementation

The impact of Recommendation 68-6 is difficult to assess. Only one other agency, the Nuclear Regulatory Agency (formerly the Atomic Energy Commission), uses an intermediate appellate review board similar to those used by the FCC and ICC,[116] and Congressional authorization to establish such a board antedates 68-6.[117] Several other agencies utilize review boards to examine ALJ decisions, but these panels constitute the final agency review, replacing review by the agency head.[118]

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[116] The NRC review board, its history and operation are described in Cotter, Nuclear Licensing: Innovation Through Evolution in Administrative Hearings, 34 AD. L. REV. 497 (1982). Unlike the boards at the FCC and ICC, the NRC's intermediate review largely is conducted in part by part-time employees. See infra text accompanying notes 173-179.

[117] Atomic Energy Act of 1954, 42 U.S.C. § 2241 (1976).

Discretionary review, however, is increasingly used to reduce the review burden of agency heads. More than one-third of the agencies employing ALJs provide for discretionary review in at least some instances.[119] The three agencies using intermediate review boards to screen ALJ decisions all provide for further review at the discretion of the agency members.[120] Adding these to the ten agencies providing for discretionary review of ALJ decisions directly by the agency head or his delegate, almost half the agencies employing ALJs provide some discretionary review. At the same time, a majority of agencies also still provide, in at least some cases, for review as of right to a party filing timely exceptions,[121] and ALJs for five agencies render recommended decisions (in some or all cases) that automatically are reviewed by the agency before becoming final.[122] Nonetheless, in

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118. These agencies are: Department of Housing and Urban Development, Department of Interior, Department of Labor, and the Social Security Administration of the Department of Health and Human Services. Their operations are further described in Appendix 1 to Part III, infra.

119. Ten of the twenty-eight agencies for which information was available, or roughly 46 percent, provided for discretionary review in some or all cases: CAB, EPA, FMHRC, HUD, Interior, Labor, MSPB, OSHRC, SEC, and SSA.

120. See 10 C.F.R. § 2.786 (1981) (NRC); 47 C.F.R. § 0.365 (1980) (FCC); 49 C.F.R. § 1100.98 (1980) (ICC).

121. These agencies include: Department of Agriculture, Bureau of Alcohol, Tobacco & Firearms, Commodities Future Trading Commission, Consumer Product Safety Commission, Environmental Protection Agency, Federal Communications Commission, Federal Energy Regulatory Commission, Federal Labor Relations Authority, Federal Maritime Commission, Federal Trade Commission, Food & Drug Administration, Department of Interior, Interstate Commerce Commission, Department of Labor, Maritime Administration, National Labor Relations Board, National Transportation Safety Board, Nuclear Regulatory Commission, Securities Exchange Commission, U.S. Coast Guard, and U.S. Postal Service.

122. These agencies are: Civil Aeronautics Board, Drug Enforcement Administration, Interstate Commerce Commission, Merit Systems Protection Board, and U.S. International Trade Commission.

contrast to the situation in 1968, the certiorari-type review advocated by 68-6 for agencies with heavy adjudicatory decision caseloads has been adopted by most of the agencies with heavy caseloads. Ranked according to number of cases closed in the most recent year for which figures are tabulated, nine of the fifteen agencies with heaviest caseloads (including six of the first seven) provide for discretionary review.[123] The agencies dovary dramatically as to the degree to which discretion is exercised to grant review and the frequency with which such review results in reversal of the ALJ's decision.[124]

The reasons why some agencies have and others have not implemented the reforms suggested by 68-6 are not easily discerned. The differences in the types of cases heard by ALJs, the simplicity or complexity of cases, their similarity or dissimilarity, the constituencies of the agencies, and the nature of each agency's legislative mandate all may play a role. To some extent, the impact of factors such as these on the shape of agency review is explored in Parts III and IV of this report. Here, only one impediment to fuller implementation of 68-6 -- legislative inaction -- is discussed.

The second paragraph of 68-6 recommended the enactment of legislation to clarify (more precisely, to grant clearly) the authority for agencies to alter their review procedures in accord with the suggestions of the first paragraph of 68-6. Specifically, 68-6 proposed amendment of §8 of the Administrative Procedure Act, codified at 5 U.S.C. §557 (1976), to empower agencies to create intermediate appellate review boards or adopt certiatori-type review practices.

Section 557 as written is not entirely clear as to the extent to which review of ALJ decisions by agency heads or at least by a delegate of the agency head, is required. The section states that when the agency head does not preside at an adjudicatory hearing, the presiding employee (ALJ) shall render an "initial decision" unless the agency, in certain classes of hearings, chooses to have the record certified to it for decision (bypassing any ALJ decision) or chooses to style the ALJ decision as only a recommended decision.[125] The exceptions contemplate agency decision where the ALJ decision stage is eliminated or automatic agency review where the ALJ decision is only tentative or recommended. In all other cases, the initial decision of the ALJ "becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency . . . ."[126] Section 557 notes that the issues reviewed may be limited "on notice or by rule."[127] The final subpart of §557 states:

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[123] Ten of the first 15 in number of ALJs provide discretionary review. It should be noted, however, that agencies with heavier caseloads tend to use discretionary review by review boards or individual designates, or discretionary review following board or individual designate review, rather than the process apparently contemplated by ACUS 68-6: discretionary agency head review without an intervening review authority. See text at note 155, infra.

[124] See Parts III and IV and Appendices, infra.

> (c) Before a recommended, initial, or tenative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for consideration of the employees participating in the decisions--
>
> (1) proposed findings and conclusions, or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions . . . .

This language might be construed to mean that in all adjudicatory cases parties are entitled both to propose findings prior to ALJ decision and to file exceptions after ALJ decisions. Moreover, the entitlement to file exceptions may imply an obligation on the part of the agency to review each case in which exceptions are filed. The ultimate extension of this implication would be that a full review is required, not simply a determination that no serious issue is presented meriting such comprehensive review.[128] Alternatively, the section could be read as permitting agencies to refuse review altogether (by delegating to the ALJ the responsibility to hear objections, by construing satisfaction of §557(c)(1) and (3) as obviating any entitlement to file exceptions -- that is reading (c)(1) and (c)(2) as alternatives rather than prescriptions for different levels of administrative decisionmaking -- or by reading the agency's right to limit issues on review as including the right to deny review or to review as one might a petition for certiorari). The proposal for legislative action in 68-6 was designed to cure just this ambiguity.

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[125] 5 U.S.C. § 557(b) (1976).

[126] *Id.*

[127] *Id.*

Despite the introduction of legislation designed to implement the proposal, Congress has not yet amended §557. In 1976, the Senate Committee on the Judiciary favorably reported, and the Senate passed, S.796, which would have added to §557 a subsection (d) providing:

> Each agency may establish, by rule, one or more agency appeal boards for review of decisions of presiding employees . . . An agency may provide by rule that decisions . . . ,including [ALJ's initial decisions and] agency appeal board decisions, become final unless reviewed by the agency in its discretion.[129]

Passage by the Senate came late in the session,[130] and the legislation died with adjournment of the 94th Congress. The next Congress considered a bill, S.2490, similar to S.796, and the Judiciary Committee's Subcommittee on Administrative Practice and Procedures held hearings on the bill,[131] but it was never reported out of committee. Bills also were introduced in both houses during the 96th Congress (S.67 and H.R. 1866) to implement ACUS Recommendation 68-6, but these, too, failed to pass.

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[128] See Administrative Procedure Act Amendments of 1978: Hearings on S. 2490 Before the Subcomm. on Administrative Practice and Procedure of the Sen. Comm. on the Judiciary, 95th Cong., 2d Sess. 603 (1978) [hereafter 1978 Hearings]. The argument that this must be the proper interpretation of these provisions and that in 5 U.S.C. § 557(b) (1976) declaring that on review of initial decisions an agency has the same power as if it made the initial decision "except as it may limit the issues on notice or by rule" is forcefully made in Auerbach, Scope of Authority of Federal Administrative Agencies to Delegate Authority to Hearing Examiners, 48 MINN. L. REV. 823, 853-61 (1964).

[129] S. Rep. No. 1258, 94th Cong., 2d Sess. 15 (1976).

[130] See 122 Cong. Rec. 34, 442 (Oct. 1, 1976).

[131] See 1978 Hearings, supra note 128.

While general legislation to implement 68-6 has not been enacted, Congress has legislated respecting specific agencies' review procedures on at least five occasions since the Conference adopted 68-6. The tenor of these specific enactments generally, although not uniformly, has been in accord with 68-6. In 1970, the Congress created the Occupational Safety and Health Review Commission (OSHRC). The enabling statute, followed by the implementing regulations, plainly provides for review of ALJ decisions at OSHRC's discretion.[132] Two years later, in amending the Workers' Compensation Act of 1927, Congress established the Benefits Review Board within the Department of Labor and made Board review of initial decisions by ALJs in compensation cases a matter of right.[133] In 1977, the Federal Mine Safety and Health Review Commission was established with express statutory provision for discretionary review of ALJ decisions.[134] In specifying a means for review of ALJ decisions by the Federal Labor Relations Authority (FLRA), Congress appears again to have expressed a belief that review should be at the discretion of the agency. The relevant statute declares that "[t]he Authority may, upon application . . . review [ALJ decisions] . . . . If the Authority does not undertake to grant review . . ., the action shall become the action of the Authority . . . ."[135] FLRA regulations, however, appear to provide review of right to parties filing timely exceptions to ALJ decisions.[136] Finally, Congress amended the Interstate Commerce Act of 1887 in 1976, 1978, and 1980, limiting review of initial decisions by the full commission in the process.[137] Review of right was retained at the initial level of ICC divisions and boards, but review by the full commission now is possible, as a rule, only on the Commission's action, to be exercised in matters of "general transporation importance" or where new evidence has surfaced.[138]

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[132] See 29 U.S.C. § 661 (1976); 29 C.F.R. § 2200.92(a) (1980).

[133] See 33 U.S.C. § 921(b) (1976).

[134] See 30 U.S.C. § 823(d)(2)(A)(i) (Supp. IV 1980).

[135] See 5 U.S.C. § 7105(f) (Supp. IV 1980).

[136] See 5 C.F.R. § 2423.29(a) (1981).

[137] See 49 U.S.C. §§ 10322, 10327 (Supp. IV 1980).

As with general reform of agency review proceduces, there have been instances in which proposals to alter individual agencies' procedures in the direction suggested by 68-6 have not succeeded. Repeated efforts to amend §10 of the National Labor Relations Act have foundered. In 1971, a bill that would have made ALJ decisions final, subject to discretionary review by the National Labor Relations Board, was the subject of hearings in the House but died in committee.[139] Two similar bills met a like fate in 1976.[140] The following year one such measure was passed by the House but was not voted on by the Senate.

In sum, at both the agency and congressional levels, there has been a drift toward the agency review processes proposed by ACUS Recommendation 68-6, but full implementation has not occurred at either level.

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[138] *See* 49 C.F.R. §§ 1011.1-1011.3, 1011.6(e), 1115.2, 1115.3 (1982).

[139] *See Amendments to Expedite the Remedies of the National Labor Relations Act: Hearings on H.R. 7152 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. (1971).

[140] H.R. 8110, H.R. 8408, 94th Cong., 1st Sess. (1975); *See Oversight Hearings Before the Subcomm. on Labor Management Relations of the House Comm. on Education and Labor*, 94th Cong. 1st sess. (1975).

III. Agency Review of ALJs' Decisions: Current Practices

A. Selecting Discriminators for Description and Evaluation

Disparities in agency review of ALJs' decisions are at once a consequence of congressional and administrative failure fully to adopt ACUS 68-6 and probably also a cause of some resistance to the Conference's recommendation. The existence of different sorts of intra-agency review is not likely to be the product of accident. It may be that deviations from the patterns suggested by 68-6 for agencies with "a substantial caseload of formal adjudication" are the result of misunderstanding of the impact the suggested procedures would have on review of a given class of adjudications. It is perhaps just as likely, however, that the differences in review are rational responses to differences in the decisions at issue, the personnel involved, the agency structure, or other matters that distinguish one agency adjudication from another.

Any attempt to assess the sort of review appropriate to ALJ decisions faces two related obstacles. The first obstacle is one of description, the second, one of evaluation. Description of the relevant setting is a necessary prelude to discussion of the appropriate review. But exactly what factors are relevant to the setting is problematic absent clear standards for evaluation. Unless the full complexity of the world is to be replicated, it is necessary to select among the factors that differentiate agencies and adjudications. In examining current practices for agency review of ALJs' decisions, one encounters a host of variables that distinguish review practices among agencies, and even review of different ALJ decisions within an agency. Among the points of difference are the procedures used to obtain review, the number of review levels, the identity of reviewing personnel, the individual or collegial nature of the reviewing authority, the extent of the deference to the subordinate decisionmaker's determination, the organization of the agency, the type of issue reviewed (for instance, facts pertaining to a single individual might receive treatment different than interpretation of economic data affecting matters of industry-wide or inter-industry interest), and the statutory mandate under which the substantive dispute arises. Additionally, factors less immediately assimilated to review processes may play important roles in distinguishing the nature of review at one agency from that at another, including the size of the agency, the number of ALJs employed by it, the volume of cases handled by the agency's ALJs, and the agency's mission and clientele (*e.g.*, is the agency charged with comprehensive regulation of a single industry? or does it deal with a variety of groups, industries, and individuals?).

These factors can be segregated into two major groups. One set of variables, which may be called process variables, directly determines the manner in which decisions are made and reviewed.

The process variables critical to review are who reviews, what sort of review is given. These inquiries include the background and job structure of the number of reviewers, the deference paid to the ALJ on review, the availability of subsequent intra-agency review, and the deference paid to the preliminary agency reviewers. Decision respecting process variables initially rests with Congress, but now frequently is within the agency's control. The other factors, which may be termed situation variables, do not directly control the method of review but may contribute as much or more to determining how long it takes and how well it works.

The generally accepted criteria for evaluating governmental processes do not readily reveal which of these factors is critical, although consideration of the criteria does suggest some matters to which descriptive efforts should be sensitive. The three common evaluative criteria are (1) efficiency of the process, (2) accuracy of the result, and (3) acceptability to the parties. The first criterion, efficiency, incorporates the judgment that, other things being equal, the process should cost as little as possible and involve as little delay as possible.[141] The second criterion, accuracy, asks that the end product of agency decisionmaking be faithful to the statutory mandate at issue. The third criterion, acceptability, places value on the sense of parties to a proceeding that the process is fair. Obviously, none of the three criteria provides a precise measure of desirability and, more important, absent incorporation of some other standard the three criteria lack any common denominator in which adjustments among them can be made. While processes that rate highly on all three grounds universally will be preferred to those that do poorly on all grounds, other comparisons almost certainly will produce dispute. For example, any choice between one process that seems inefficient but very acceptable and a second process that seems efficient but less acceptable will depend on assessments of the extent to which one goal or the other is compromised and on the relative importance of the goals. These judgments are bound to be both imprecise and subjective.

Moreover, theoretical objections to these criteria are compounded by the practical problem of obtaining useful data. Many of the easily described aspects of agency adjudication and review do not readily correlate with these criteria. Granting both the measurement difficulties, especially as to accuracy and acceptability, and the problem of balancing the three, however, these still allow some rough measure of a review process' propriety. For each criterion, some information is available that should allow defensible inferences about it to be drawn.

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[141] See, e.g., Boyer, supra note 23, at 145-46. The notion of efficiency used here by focusing on process costs captures only a subset of the considerations more generally subsumed under the rubric of efficiency. See, e.g., A. SEN, supra note 100, at 21-32, 196-200.

The efficiency criterion can be broken down into several subparts. The monetary cost concerns affect both government and nongovernment parties, and the time concerns (another measure of cost) can be divided into active (the time consumed by decisionmaking) and passive (warehousing or waiting) components, as well as into pre-review and review phases. The direct costs can be dissociated further into the cost of government reviewers (including the opportunity-cost of review time), the cost of support staff involved in review, costs borne by nongovernmental parties, and the cost of these parties' suupporting personnel (lawyers, expert witnesses, and so on). It is not necessary that the subparts of the efficiency criterion move in concert; a review process might, for example, impose high costs on government and minimal direct costs on nongovernment parties. Information on most subparts is not easily gained. The data available permit assessment of the following: the time consumed by the whole decision and review process; the time taken for review alone; the level (and, hence, cost) of the nominal reviewer(s). Albeit imperfect substitutes for information on all of the subparts, these factors give some indication of the efficiency of review.

The accuracy criterion is less easily used. In a real sense, fidelity to statutory command cannot be ascertained. Unless disparate interpretations of the legislative mandate are advocated, there is no need for concern over accuracy. Yet, whenever different views are advanced, there is some ambiguity (often a great deal) in the congressional directive the agency is engaged in elaborating and implementing. There is no arbiter of the true legislative intent, assuming a single, determinate, legislative intent can exist. ALJs, administrative reviewers, courts, and legislators now in office may offer plausible and incompatible interpretations. Reference to the discretion vested in those who are charged with executory powers does not offer an easy solution, since the extent of that discretion is an integral part of the argument over statutory meaning. Nonetheless, it plausibly may be presumed that within any administrative body the agency head (or his delegate) is best situated to interpret the agency's mandate. Global definitions of right and wrong aside, the lawmaking process generally contemplates subsequent harmonization of conflicting interests at the administrative level, and the agency head is most likely to be sensitive to this task. The frequency with which ALJs' decisions are reversed by whomever the agency head charges with review responsibility, thus, may serve to measure the contribution of agency review to increased accuracy.

The final criterion, acceptability, is the most unwieldy of the three. Professors Walker and Thibaut have endeavored to ascertain preferences for various procedures, largely through the use of simulations using students as surrogates for parties to litigation.[142] Their research revealed a preference for relatively great amounts of client control over civil litigation, but there is no similar research on preferences among review processes nor is there information on the intensity of process preferences. Common sense may supply a basis for guessing what the parties' preferences generally would be, but translating that guess into information on actual preferences in specific situations is difficult. It seems safe to assume that parties generally would prefer review mechanisms that allow review at their behest but not otherwise, agency officials would prefer review at their option, and ALJs would favor limiting review to a minimum. It also seems that the strength of those preferences would vary with the value of the interest at stake. The nongovernment parties have the most directly in issue, the ALJs least, but the intensity of individual interests in particular cases cannot readily be predicted. Some information on the interest in review may be derived from the frequency with which it is sought by those with an opportunity to demand it and granted by those with authority to deny it. On the other hand, the demand for review may to a significant degree be a function of the effect of review on tolling the impact of the ALJ's ruling. Even if the initial decision is quite unlikely to be reversed, there may be considerable value to one party in postponing the decision's effect. This is especially true in enforcement actions involving termination of a substantial government benefit.

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[142] See, e.g., studies discussed in Walker, Lind & Thibaut, The Relation Between Procedural and Distributive Justice, 65 VA. L. REV. 1401, 1407-11 (1979). See also J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE (1975); Thibaut & Walker, A Theory of Procedure, 66 CALIF. L. REV. 541 (1978); Lind, Thibaut & Walker, Discovery and Presentation of Evidence in Adversary and Non-adversary Proceedings, 71 MICH. L. REV. 1129 (1973).

The preference found by Walker, Thibaut and Lind for greater participation in and control over proceedings affecting one has been articulated by others who place reliance on deontological reasoning rather than experimentaion. See, e.g., Mashaw, supra note 23; Michelman, Formal and Associational Aims in Procedural Due Process, in DUE PROCESS, NOMOS XVIII, at 126 (J. Pennock & J. Chapman, eds.); Saphire, Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection, 127 U. PA. L. REV. 111 (1978); Summers, Evaluating and Improving Legal Process -- A Plea for "Process Values," 60 CORNELL L. REV. 1 (1974).

Another possible indicator of the value of a case to the government and nongovernment parties, and inferentially the value of review, may be the length of time taken at the ALJ decision stage. The commitment of resources to a lengthy proceeding is determined in part by the value of the decision. The difficulty of the factual issues, however, also will affect the length of proceedings, and this factor need not be coincident with the policy impact or monetary stakes of the dispute. Moreover, length of ALJ proceedings may not indicate the value of review (in subjective, nonmonetary terms) insofar as relatively small claims have great importance to impecunious parties.

The three evaluative criteria provide guidance to discussion of agency adjudication and review processes that is necessary, but not sufficient. The indicators of efficiency, accuracy, and acceptability noted above should be addressed so far as possible, but selection among the myriad factors that play a part in determining whether particular processes will be efficient, accurate, and acceptable means of making specific decisions must still depend to some extent on intuition. To minimize the impact of the choice of descriptive aspects on ultimate conclusions, the Report uses four different descriptive components. First, a typology of current agency review is developed based on three process variables. Second, expanded descriptions including attention to situation variables as well as process variables are given for selected agencies. Third, a shorter description is given of decision and review at every agency, organized according to the typology. Finally, statistical information is assembled on decision and review at the agencies employing ALJs, and possible correlations with the evaluative criteria are examined both for factors relevant to the typology and for other factors that may be significant. The first and second descriptions form sections B and C of this Part. The third and fourth segments, descriptive and statistical information for all agencies, are in the appendices to this Part, and the correlations are presented as an appendix to Part IV. Information in all four segments is discussed in Part IV.

B. Typology of Review

The typology uses three factors: the level of the reviewing authority (agency head or subordinate), the composition of the reviewing authority (individual or group), and the manner by which review is obtained or denied (automatic review, review as of right at the behest of interested parties, review at the discretion of the reviewing authority, or no review). The first of these three factors should reflect, at least in some measure, the significance of the decision being reviewed, higher level review presumably being consonant with more important decisions. The second factor also indicates the extent of the agency's resource commitment to review: other things being held equal, the greater the number of persons committed to the review process, the greater the importance attached to review. The last factor affects review at each stage if there is more than one potential level for review. Arguably it provides some insight as to the degree of deference accorded the decision reviewed. Where there is no review, obviously, deference to the subordinate's decision is complete. Where review is automatic, little deference is implied; even though such review could, in theory, be coupled with review standards that resulted in affirmance of the prior decision except in extraordinary cases, such deference is inconsistent with a scheme that provides review in all cases.[143] Together, then, these three factors should describe the finality of ALJ and subsequent intra-agency decisions and the nature of the agency's commitment of resources to the review process.

Using these three factors, no fewer than twenty-two different review categories can be identified. Of these, only fourteen seem to be in use, although the number could reduce to twelve depending on one's definition of what constitutes an agency (should a sizeable bureau that in many ways operates autonomously within an executive department, for instance, be considered the agency when evaluating the review level within the agency? or should the department be viewed as the agency and its cabinet officer as the relevant agency head?). Only instances in which the administrative law judge actually renders a decision, rather than all proceedings in which ALJs participate, are included.

The eight null sets among the review categories possible using these three discriminators are: first stage review by appeals board (automatically following a recommended decision, as of right following an initial decision, or in the board's discretion following initial decisions by an ALJ) and further agency review of right; discretionary agency review of an appeals board determination (following either a recommended decision or an initial ALJ decision) reviewed in the board's discretion; appeals board review as the final agency review of an ALJ's recommended decision; and discretionary appeals of the determination of a designate who reviews initial ALJ decisions either of right or in his discretion. Failure to use some of these review mechanisms indicates that where there is sufficient concern to require automatic review of ALJ decisions, review will be initially at a high level within the agency. The presence of other null sets may be explained by reluctance to require review of appeals board decisions. Such review mechanisms would require a great commitment of agency resources and would be incompatible with the use of review boards to reduce agency heads' workloads. The categories now used are described below. The categories proceed generally from those implying least to those implying greatest deference to the ALJ's decision. The empty categories are numbered but are not discussed.

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[143] The sitution would be similar to that of a football team where the coach insisted on sending in plays to the quarterback, but the coach always sent a player in not with a play but instead with the message that the quarterback should do what he thought best. But see the information re CAB review of foreign carrier permits decisions, at Appendix 2 to Part III, infra.

1.-3. Review by Agency Head

In three categories, the administrative law judge's decision receives review from the agency head directly, without the substitution or interposition of any intermediate level of review. All three categories represent review practices currently in use. Indeed, in twenty-four of the twenty-eight agencies for which figures are available on review of ALJ decisions, there is direct review by the agency head (in a multimember agency, the agency members) in at least some cases. Included in this group are nearly all the independent regulatory agencies. The agency head in many instances will rely on a subordinate to review in detail the record and objections to the ALJ's decision,[144] but at least nominally (and in some cases in actuality) the responsibility for evaluating the decision lies with the agency head.

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[144] The degree to which such staff support can be used (without eviscerating the requirement that the nominal decider in fact decide each administrative adjudication) and the extent to which reviewing courts can scrutinize the decisional processes used are discussed in the four Morgan cases: Morgan v. United States, 298 U.S. 468 (1936); Morgan v. United States, 304 U.S. 1 (1938); Morgan v. United States, 307 U.S. 183 (1939); United States v. Morgan, 313 U.S. 409 (1941). For a discussion of the effect of these cases on American administrative law, *see* Gifford, *The Morgan Cases: A Retrospective View*, 30 AD. L. REV. 237 (1978).

1. Recommended Decision: Automatic Review

In five agencies, the ALJ in some cases makes only a recommended decision which then automatically is reviewed by the agency head.[145] Caseloads subject to this review process tend to be low.[146] None of the agencies using this process is a cabinet-level department, although one (The Drug Enforcement Agency of the Department of Justice) is a departmental bureau.[147] The cases are a mix of licensing and enforcement proceedings. Some present rather special considerations -- such as the potential for involvement of sensitive foreign policy issues in Civil Aeronautics Board decisions respecting foreign air carriers or the concern over the extent of decisional authority appropriately granted to an ALJ in Merit System Protection Board cases adjudicating sanctions against another ALJ -- that on their face are plausible explanations for extremely nondeferential review.

2. Review of Right

The largest single category is review by the head of the ALJ's agency at the behest of a party or on the agency head's own motion. Review of right is provided in fifteen agencies. The agencies in this category include independent regulatory commissions (old and new), a cabinet department, and bureaus within cabinet departments. The cabinet department, however, provides secretarial review of right only for a very few cases comprising a very small percentage of its adjudications.[148] The other agencies in this category do not all have caseloads that conform to this pattern. Some of the caseloads subject to agency head review of right are extraordinarily small,[149] while others are extremely large;[150] the caseloads in this category in all but four agencies fall below the median for agencies employing ALJs, but those four agencies are within the top ten in numbers of initial decisions, and all ALJ decisions at those agencies receive agency head review of right.[151] The cases span enforcement, licensing, and resolution of what essentially are disputes between private parties. The proceedings at most of the agencies principally may be characterized as enforcement actions, but in number of cases the largest group is dispute resolution between private parties.[152]

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[145] The agencies are: Civil Aeronautics Board (CAB); Drug Enforcement Agency (DEA); Interstate Commerce Commission (ICC); Merit Systems Protection Board (MSPB); and U.S. International Trade Commission (USITC). In other cases there is provision for use of these procedures at the agency head's discretion. See notes 326 and 328, infra. See also Appendix 2 to Part III, Review and Decision Data, infra [hereafter Review Data].

[146] See Review Data, Appendix 2.2, infra.

[147] The Bureau may be seen as an agency or as part of an agency (the Treasury Department). See category 20, text at notes 166-167, infra. See also note 2, supra. Its existence as an entity within the Treasury Department has statutory basis and is not merely a departmental convenience of organization. For a list of agencies designated as "separate statutory agencies," see 5 C.F.R. § 737.31 (1981).

3. Discretionary Review

The second largest grouping under the review typology presented here is composed of agencies that provide for review of ALJ decisions by the agency head at his discretion. There is no intermediate review stage, but the agency head, if he wishes, may defer to the ALJ rather than review the decision even though a party takes exception to the decision. The agency head also may choose to review on his own initiative.[153] The borders of this category and the review of right category are not drawn with bright lines. The agency head may in fact review each decision and "grant review" where he believes either a mistake was made by the ALJ or the case is of sufficient importance (whether for reasons intrinsic or extrinsic to the basis for decision) to merit additional participation by the parties or some other expanded review process. This discretionary review would differ little from a process that afforded parties review as of right. At the opposite pole, a discretionary review process might demand a clear showing of a substantial departure from agency or judicial precedent or otherwise require a high threshold to be crossed before review would be granted. As described in their regulations, the seven agencies in this category arguably fall closer to the latter than to the former description of discretionary review. Whether this is so in practice is more difficult to say.[154] Despite the fact that ACUS 68-6 promoted discretionary review for agencies with substantial adjudicatory caseloads, only one agency in this category (Occupational Safety and Health Review Commission) falls above the median in number of initial decisions.[155] The cases subject to discretionary agency head review include licensing decisions and enforcement actions with the latter overwhelmingly dominant.

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[148] See Review Data, Appendix 2.1, 2.2, 2.4, infra, discussing the Department of Labor.

[149] E.g., Food and Drug Administration and Maritime Administration. See Review Data, Appendix 2.1, 2.2, infra.

[150] E.g., National Labor Relations Board. See Review Data, Appendix 2.1, 2.2, infra.

[151] These agencies are: Federal Energy Regulatory Commission; National Labor Relations Board; National Transportation Safety Board; and the United States Coast Guard. See, Review Data, Appendix 2.1, 2.2, 2.4, infra.

[152] The NLRB handles the lion's share of these cases. See Review Data, Appendix 2.4, infra.

[153] Although agencies could provide for review only if a party appealed the ALJ's decision, I have found no instance where review by agency head is provided without own motion review.

4-12. Review by Appeals Board

The use of appeal boards already has been touched upon in connection with implementation of ACUS Recommendation 68-6. There are nine possible review categories using appeal board review of ALJ decisions. Each category is defined by the basis on which the ALJ's decision is reviewed and by the basis on which the appeals board decision is reviewed. Currently, only three of these categories are used. Seven agencies may be classed among these categories. Possible review categories not currently used are: 4. Recommended Decision, Further Agency Review of Right; 5. Board Review of Right, Further Review of Right; 6. Discretionary Board Review, Further Review of Right; 7. Recommended Decision, Discretionary Further Review; 9. Discretionary Board Review, Discretionary Further Review; and 10. Recommended Decision, No Further Review.

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[154] The data on review in these agencies (Civil Aeronautics Board, Environmental Protection Agency, Federal Mine Safety and Health Review Commission, Department of Housing and Urban Development, Merit Systems Protection Board, Occupational Safety and Health Review Commission, and Securities and Exchange Commission) are less than uniform. See Review Data, Appendix 2.2, 2.4, infra.

[155] See Review Data, Appendix 2.2 infra.

8. Board Review of Right, Discretionary Agency Review

Three agencies provide review of right by appeal boards to parties filing timely requests for review, with further review at the discretion of the agency head. In terms of adjudication caseloads, the agencies are quite disparate, ranking near the top, middle, and bottom among agencies employing ALJs. All three, however, are independent, multimember, regulatory agencies that perform licensing functions and that deal on a continuing basis with particular industries.

11. Board Review of Right, No Agency Review

Two agencies use appeals boards as the sole forum for intra-agency review and provide review as of right at the board level. One other agency arguably might be classifed in this category, depending on its characterization as agency or subordinate bureau.[156] Cases subject to this review involve benefits administration, licensing, and enforcement. The two executive departments that use this review (Interior and Labor) employ it for relatively large numbers of cases, while the departmental bureau (Maritime Administration of the Department of Commerce) has a very small caseload.[157]

12. Discretionary Board Review, No Agency Review

Four agencies use discretionary review by an appeals board as the final stage of agency review. Three of these agencies are executive departments, and the fourth is the Social Security Administration of the Department of Health and Human Services. The cases decided by the cabinet departments fall generally under the heading of licensing decisions, while SSA determinations concern individual claims for governmental benefits. Except for SSA, the agencies use this review process for very small numbers of cases.[158] SSA, on the other hand, has an enormous caseload, accounting for about ninety-five percent of all formal adjudications in federal agencies.[159]

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[156] See 5 U.S.C. § 737.31 (1981), and notes 2 and 147 supra.

[157] See Review Data, Appendix 2.2 infra.

[158] Id.

[159] Id., Appendix 2.1, 2.2.

13.-21. Review by Individual Designate

All but one of the remaining review categories provide for review by an individual designate of the agency head. There are nine possible categories involving designate review. Current agency practices can be classified under seven of these categories. The two categories not used are: 17. Designate Review of Right, Discretionary Agency Review; and 18. Discretionary Review by Designate, Discretionary Agency Review.

13. Recommended Decision, Agency Review of Right

Only one agency now provides for a recommended decision by the ALJ, reviewed automatically by a designate of the agency head, with further review by the agency head as a matter of right. The Bureau of Alcohol, Tobacco, and Firearms of the Department of the Treasury provides for automatic review by a regional administrator of any ALJ decision involving contested applications for certain authorizations regarding alcoholic beverages, explosives, firearms, and ammunition. Further review by the Director of the Bureau is available of right.[160]

14. Designate Review of Right, Further Review of Right

Although several agencies provide for review of ALJ decisions as of right before a designate of the agency head, only one arguably provides further review as a matter of right. It is, in fact, two agencies, one (the Coast Guard, a bureau of the Department of Transportation) the head of which reviews ALJ decisions on violation of agency rules or statutory provisions the agency is charged with enforcing, the other (National Transportation Safety Board) a separate collegial body with responsibility for reviewing decisions of the first. A relatively large group of cases is subject to this review. The absence of other agencies in this category, or of any agencies in category 17 and category 18 may reveal that commitment of review functions to a designate is designed (at least in large part) to reduce the review burden on the agency head and providing for review of the subordinate's decision as a matter of right would reduce the benefit of that deflection of responsibility. That the only "agency" in this category is the fictive combination of two agencies that are formally separate indicates that a second stage review of right is provided only where the dynamics of decisionmaking might shift dramatically from one level to the next, as it might (but this does not mean it necessarily will) where the first-level decisionmaker is not responsible directly to the second-level reviewer.

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[160] 27 C.F.R. §§ 200.105-200.116 (1982).

15. Discretionary Review by Designate, Further Review of Right

Only one agency at present uses review procedures that provide for a designate in his discretion to review ALJ decisions with review of right by the agency head at the second stage. The Department of Labor uses this process for one type of enforcement action.[161] If the designate, by decision or by denying review, upholds a determination that the relevant statutory provision has been violated, the Secretary of Labor must decide whether to impose the statute's presumptively prescribed sanction, or, on petition of the affected private party, to take some other action.[162] Decisions under this particular regulatory program are rare and appeals almost nonexistent.[163]

16. Recommended Decision, Discretionary Further Review

Automatic review of an ALJ's recommended decision by a designate followed by discretionary review at the second review level is also used in one agency, although in that agency the subsequent review is not at the agency head level. Again, this procedure is used in one type of case adjudicated in the Department of Labor involving the determination of wage rates to be paid by certain government contractors.[164] A relatively small caseload is affected.

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[161] These involve proceedings contesting violations of the Walsh-Healey Public Contracts Act of June 30, 1936, 49 Stat. 2036 codified at 41 U.S.C. § 35-45 (1976). See 41 C.F.R. §§ 50-203.10, 50-203.11 (1982).

[162] 41 C.F.R. § 50-203.11(g), (h) (1982).

[163] Only one initial decision in such a case was rendered in Fiscal Year 1978, and that decision was not reviewed. See Review Data Appendix 2.2, infra.

[164] Cases in this category involve disputes arising under the Davis-Bacon Act, 46 Stat. 1494, codified at 40 U.S.C. § 276a et seq. (1976). See 29 C.F.R. §§ 1.12-1.16 (1982).

19. Recommended Decision, No Agency Review

The final three categories of designate review are ones in which there is no agency head review following decision by a designate. All three categories describe currently used practices, although for two categories only one agency uses the procedure and in each case the agency more appropriately could be listed under another category.[165] The first of these categories provides review automatically of recommended ALJ decisions. Review at one departmental bureau is provided by the bureau head with no subsequent review by the department head. The bureau's caseload is fairly small, principally concerned with licensing decisions. Like the determinations discussed in category 13 above, also subject to automatic review the decisions here involve permits to engage in activities relating to substances frequently linked with organized criminal activity. Automatic review in both instances may be explicable on this ground.

20. Designate Review of Right, No Agency Review

This category is used by more agencies than is any other category of designate review. Only agency head review of right (category 2) and discretionary review by agency head (category 3) now are used by more agencies. Five agencies use this procedure and two more could be added if not viewed as separate from their "umbrella" executive departments. Most of the agencies in this category are executive departments;[166] nearly all the cases subject to this review are enforcement actions; and the caseloads for which this review is used at most of the agencies are of moderate size, generally falling in the middle quintile for agencies employing ALJs.[167]

21. Discretionary Review by Designate, No Agency Review

One agency, the Department of Housing and Urban Development, provides for discretionary review by a designate and no subsequent review by the agency head. The individual reviewer decides whether an appeal from a license suspension should be allowed. The merits of the appeal, however, will be heard and finally decided by a collegial appeals board.[168] Review was granted for all of the small number of decisions during the time for which data are available.

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[165] See discussion of cases in categories 19 and 21 text at note 349, infra, and immediately following note 354. See also notes 2 and 147, supra.

[166] Agencies using this sort of review are: Departments of Agriculture, Health and Human Services, Interior, and Labor, as well as the U.S. Postal Service (formerly a Cabinet-level executive department), the Bureau of Alcohol, Tobacco and Firearms, and the Environmental Protection Agency.

[167] See Review Data, Appendix 2.2, infra.

22. No Review

The categories have been organized generally from those by implication granting least deference to the administrative law judges' decisions to those granting most deference. It is difficult to defer to the ALJ decision more fully than by providing no avenue for intra-agency review.

Only one instance has been found of a federal agency providing no review of an ALJ decision. In proceedings before ALJs at the Department of Labor challenging the imposition of civil penalties under the Fair Labor Standards Act for violation of the act's restrictions on use of child labor, the ALJ decision is the final action within the department. This process was the subject of discussion in the Supreme Court's 1980 decision in Marshall v. Jerrico, Inc.[169] The Jerrico case involved a due process challenge to child labor civil penalty determinations on the ground that since the amounts paid as penalties were kept by the Department of Labor (pursuant to the Fair Labor Standards Act, the penalties are used to cover part of the department's costs of determining violations)[170] the departmental decision was biased.[171] Among the factors relied on by the Court in rejecting this contention was the absence of intra-agency review of the ALJ decision. The Office of Administrative Law Judges did not receive the penalty funds. Instead they went to the Employment Standards Administration; and although the Regional Administrators of that bureau initially evaluated complaints and decided whether to prosecute the violation charge, no one in the Administration's line of authority participated in adjudicating or reviewing the complaint.[172]

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[168] See 24 C.F.R. §§ 1720.605 - 1720.635 (1982), and discussion of category 21 at text following note 354, infra.

[169] 446 U.S. 238 (1980).

[170] 29 U.S.C. § 216(e) (1976).

[171] Cf. Ward v. Village of Monroeville, 409 U.S. 57 (1972) (Mayor whose town received "substantial portion" of its funds from fines held to be too biased to adjudicate traffic penalty cases); Tumey v. Ohio, 273 U.S. 510 (1927) (mayor who personally retained a portion of fines along with the municipality and certain other municipal employees held too partial to decide alcohol-related penalty cases).

C. Review at Selected Agencies: Group and Individual Designates

Appendix 1 to this Part discusses, in the order set by the typology above, the number and nature of the adjudications and the process by which they are reviewed, at all of the agencies employing ALJs. This section provides a more detailed, though still brief, look at a small subset of agencies. The agencies chosen all use someone other than the agency head to review the

different ways congenial to the agency head. More formal, ALJs' decisions, in some instances providing the ultimate, in other cases an intermediate, decision for the agency. Leaving the agency head as the nominal reviewer accords an agency *de facto* flexibility to allocate review responsibilities in a variety of institutional allocations of review inevitably accompany decision overtly to confide review responsibilities to subordinates. It may be easier to draw inferences about appropriate means for review from evaluation of how these latter delegations work than from attempting to capture the less stable relations that may inhere in agency head review.

The first two case studies are of agencies that use intermediate, collegial review boards. Both agencies are multi-member independent regulatory commissions. The third case study is of an executive department at which final review authority is confided to a collegial board, and the fourth study is of an executive department that uses individual designates to review ALJ decisions.

Nuclear Regulatory Commission

Adjudication and intra-agency review at the Nuclear Regulatory Commission (NRC) does not fit the usual patterns for federal agencies. The basic approach may be described best as providing for review of right by a review board intermediate between the initial decisionmaker and the agency head. There are, however, some complicating factors. First, the initial decision in matters relating to the grant, suspension or modification of a license need not be made by an ALJ. The NRC does employ ALJs, who may be assigned to preside over and decide certain cases,[173] but each also may operate as a member of an adjudicating board. By statute, the NRC may use Atomic Safety and Licensing Boards to perform the functions normally assigned to ALJs.[174] The Boards operate as ALJs would and are subject to limitations on contacts inside and outside the agency similar to those binding ALJs at other agencies.[175] Boards are composed of three members drawn from the Atomic Safety and Licensing Board Panel, a group of 24 full-time NRC employees and 31 part-time consultants.[176] Panel members are lawyers, scientists, and engineers.[177] The presiding officer of each Board must be "qualified in the conduct of administrative proceedings,"[178] and he may be the ALJ or another qualified Panel member.[179]

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[172] The Court also stressed the small amount collected from child labor civil penalty assessments.

Additional complicating factors concern the locus and availability of review. Most decisions of Licensing Boards are reviewable by Appeal Boards. Like the Licensing Boards, each Appeal Board consists of three members drawn from a larger Panel. The Atomic Safety and Licensing Appeal Panel has thirteen full-time and three part-time members, including two nuclear engineers, an electrical engineer, two physicists, and eleven lawyers.[180] While most Licensing Board decisions are appealable to an Appeal Board by any party or reviewable sua sponte by the Appeal Board,[181] decisions to grant full-power operating licenses to nuclear power plants must be reviewed by the Commission.[182] The review is automatic, but only goes to the issue of whether the initial decision should be allowed to take effect. This "effectiveness" review is without prejudice to the more comprehensive review by the Appeal Board or to subsequent review by the Commission.[183] Outside the effectiveness context, review of initial decisions is by the Appeal Board, and Appeal Board decisions are in turn reviewable by the Commissioners in their discretion.[184] The NRC's rules declare that review ordinarily will not be granted unless it appears that the Appeal Board's resolution of an important issue of fact was both clearly erroneous and contrary to the Licensing Board or that an important question of law or policy is involved.[185]

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[173] 10 C.F.R. § 2.704(a) (1981). The NRC now employs three ALJs. See Letter to Jeffrey S. Lubbers from B. Paul Cotter, Jr., Chief Administrative Judge, NRC, Jan. 11, 1983 (on file with author). Note that the figures used in the Appendices to Parts III and IV, infra (showing, for instance, one ALJ at the NRC) are not current figures, but are intended to correlate with the available data on decisions and review in ACUS STATISTICAL REPORT, supra note 1.

[174] 42 U.S.C. § 2241 (1976).

[175] See 10 C.F.R. §§ 2.719, 2.780 (1981); Asimow, When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies; 81 COLUM. L. REV. 759, 804-806 (1981).

[176] U.S. NUCLEAR REGULATORY COMMISSION; 1981 ANNUAL REPORT 144 [hereafter 1981 ANNUAL REPORT].

[177] Id. at 144, 182-183.

[178] 10 C.F.R. § 2.787 (1981).

[179] The presiding officer also may be a member of the Commission or a non-Panel Commission officer. See 10 C.F.R. § 2.074(2) (1981).

The NRC's adjudication and review process has been the subject of controversy in several respects. Most visible, perhaps, is the debate over what shape the hearings concerning licensing and rulemaking announcing licensing standards must take. The decisions of the Supreme Court and the U.S. Court of Appeals for the D.C. Circuit in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.[186] have spawned a burgeoning commentary on nuclear power decisions, administrative process, and judicial review.[187] Less notorious than issues of judicial competence and agency authority is the dispute over the way in which NRC decisionmaking works. One view of the process is captured by the statement in a study of the NRC's Appellate System conducted by the Commission's Office of the General Counsel: "The present system is fairly efficient and results in decisions that are well reasoned."[188] The study did note that the Commissioners were not involved in adjudications as early or as much as they should be. It suggested that more liberal referralof cases from the Licensing Boards and Appeal Boards to the Commission -- a seldom-used procedure already provided for in the Commission's rules[189] -- where important issues are involved and provision for interlocutory Commission review of the Board's decisions would remedy that defect.

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[180] See 1981 ANNUAL REPORT, supra note 176, at 184; Letter to the Author from B. Paul Cotter, Jr., Chief Administration Judge, NRC, Sept. 10, 1982.

[181] 10 C.F.R. §§ 1.761, 1.785 (1981).

[182] 10 C.F.R. § 2.764 (1982), in 46 Fed. Reg. 47,766 (Sept. 30, 1981).

[183] Id. See also 1981 ANNUAL REPORT, supra note 176, at 143.

[184] 10 C.F.R. § 2.786 (1981).

[185] 10 C.F.R. § 2.786(4) (1981).

[186] 435 U.S. 519 (1978), reversing 547 F.2d 633 (D.C. Cir. 1976).

Another NRC employee, however, offers a different view of the Commission's adjudication process:

> The NRC goes to extraordinary lengths to assure accuracy and acceptability of its decisions. The hearing process has three levels of review, is extremely generous in matters of public participation, and places a high value on the rational quality of its decisions. These decisions have not been timely, however. Traditional trial type hearings have inflicted serious delay. Money and resources expended have been enormous. Uncertainties have surpassed certitudes.[190]

This criticism of the efficiency of NRC decisionmaking focuses especially on the Appeal Boards' frequent review on its own motion of issues raised by Licensing Board determinations and the Appeal Boards' penchant for review of critical determinations de novo.[191] Also criticized is the length and detail of the opinions the Boards write.[192] The result is a pattern of agency decision and review that is time-consuming because much of the hearing is recapitulated in the Licensing Board opinion, because so many issues, even ones abandoned by parties to the hearing, are reviewed by the Appeal Board, and because the review is fairly searching.[193]

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[187] See, e.g., Breyer, Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy, 91 HARV. L. REV. 1833 (1978); Byse, Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View, 91 HARV. L. REV. 1823 (1978); Stewart, Vermont Yankee and the Evolution of Administrative Procedure, 91 HARV. L. REV. 1805 (1978).

[188] OFFICE OF THE GENERAL COUNSEL, U.S. NUCLEAR REGULATORY COMMISSION, STUDY OF THE NUCLEAR REGULATORY COMMISSION'S APPELLATE SYSTEM 42 (1980) [hereafter STAFF STUDY].

[189] See 1- C.F.R. §§ 2.718(i), 2.785(d) (1981). The NRC, in line with the suggestions in the Study, now uses this procedure more often. See Letter, supra note 173.

[190] Tourtellotte, Nuclear Licensing Litigation: Come on In, the Quagmire is Fine, 33 AD. L. REV. 367, 369-70 (1981). But see Letter, supra note 173.

The charges that NRC adjudication is time-consuming and that the review process contributes substantially to delay receive support from data available concerning formal agency adjudications. In the period from which the data are drawn, FY 1976 - FY 1978, only two agencies had average adjudication times longer than that at NRC.[194] Moreover, the review process took relatively longer than the initial decision; for the period examined, the NRC had the second lengthiest review process and the seventh longest initial decision time. Perhaps the most important contribution to delay, however, is time spent preparing for the initial hearing or otherwise waiting -- the initial decision takes over a year on average, the review process requires an additional year and a half, and another two years is spent in preliminaries and waiting. While the review process at NRC adds to the time taken and the cost, implicit and explicit, of review (the increased cost of construction of nuclear power plants has been estimated to be about $1 million for each day of delay),[195] the contribution of NRC review to the accuracy of the decision is questionable. Although every one of the twenty-eight initial decisions rendered from FY 1976 through FY 1978 was reviewed, none was reversed and only one was modified.

Some measure of delay in NRC adjudication is understandable, especially in cases involving the initial licensing of nuclear power plants. Nuclear licensing inevitably affects important, conflicting values. The need for energy -- and especially for assured sources of energy, domestically controlled, at reasonable prices -- is opposed to concerns over environmental degradation and personal safety.[196] The environmental and safety concerns are perhaps more poignant in these controversies than in the general run of government decisions since nuclear plants involve materials that are both extremely dangerous and dangerous for a long time (plutonium, for instance, is radioactive for about 250,000 years, and nuclear waste is toxic for at least several hundred years).[197] The concerns on both sides are not just deeply-felt, they also affect a broad spectrum of individuals. Consumers of energy and of products for which energy constitutes a substantial factor of production, residents and would-be residents of the area near the proposed plant site, persons who fear that they or their offspring might be affected by the plant's operationor disposal of its waste -- all these diffuse groups are affected by the licensing decision. That interests are intense may lead to considerable pressure to use processes that allow parties substantial latitude to shape and contribute to the determination. That the interests of many are involved may justify more involvement of the officials in shaping the decision irrespective of the parties' wishes. The NRC, thus, understandably uses decisional processes that both allow considerable scope to parties and permit consideration of issues sua sponte with which the active parties are not (or no longer) concerned.

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[191] Tourtellotte, supra note 190, at 476-82.

[192] Id. at 378-79. The NRC has adopted a somewhat different opinion format since Mr. Tourtellotte's critique was written. See Letter, supra note 173.

[193] Tourtellotte, supra note 190, at 381-82.

[194] See Review Data, Appendix 2.1 infra.

[195] Cf. Breyer, supra note 187, at 1838.

[196] See id. at 1835-40.

These concerns do not, however, explain the lengthiness of the review process. Particularly, they do not explain why the NRC uses an intermediate review board fashioned largely in accordance with the judicial model. The Appeal Board was created when the Atomic Energy Commission handled the regulatory responsibilities now performed by the NRC as well as the energy planning and development functions assigned to the Energy Research and Development Administration (now the Department of Energy) in 1974 when Congress bifurcated the AEC.[198] In considering whether the Appeal Board would still be necessary once the Commission's workload was reduced, the Senate Committee on Government Operations declared:

> Even in its new role as a Commission with only regulatory responsibility, it is unreasonable to expect that the five Commissioners would be able to do what the appeal panel now does in terms of reading and analyzing the

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[197] Id. at 1844, n.42; Cohen, The Disposal of Radioactive Wastes from Fission Reactors, SCIENTIFIC AM., June 1977, at 21, 23-27.

[198] See STAFF STUDY, supra note 188, at 1-4; supra note 116, at 499-501.

voluminous case records and technical reports, and at the same time perform all of the Commission's other regulatory roles. The continued existence of the appeal panel will ensure that the Commission will be able to oversee the licensing and rulemaking workload while carrying out its principal administrative and coordinating functions essential to the Nation's health, safety, security, and energy supply.[199]

The Committee did not examine the role played by the Appeal Board or inquire into its appropriateness.

While the gravity and intensity of the public concerns in nuclear licensing support the use of deliberate processes, it is not plain that the Appeal Board serves that end or does so well enough to merit its apparent cost. If the general impetus for intra-agency review is increasing accuracy of policy interpretation rather than factual accuracy, that hardly explains the role the Appeal Board plays. The Appeal Board is bound by the same restraints on ex parte contacts that confine the Licensing Board members, and, like the Licensing Board, Appeal Board members do not perform other policy-making functions within the Commission.[200] Factual accuracy should be sufficiently assured by the processes used by the Licensing Board and by using technically qualified deciding personnel on Licensing Boards selected from the Panel membership in light of the nature of each case.[201] Moreover, justification of the Appeal Board for its contribution to factual or policy accuracy is difficult in light of the record of NRC review, which despite its lack of speed seldom produces anything other than an affirmance.

When the NRC staff studied the appeals process and decided that the Appeal Board should be retained, it did not hesitate long on this issue. Yet the only reason offered by the staff study for retaining the Appeal Board was that it served to "highlight the signficant issues and problem areas" for Commission review.[202]

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[199] S. REP. NO. 980, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 5470, 5519.

[200] See 10 C.F.R. §§ 2.780, 2.785, 2.787; Asimow, supra note 175, at 804-807.

[201] The selection of Licensing Board members for each case is described in 10 C.F.R. § 2.721 (1981); 1981 ANNUAL REPORT, supra note 176, at 144.

[202] See STAFF STUDY, supra note 188, at 36-37.

Without the Appeal Board, the Commissioners probably would not be able as easily to review licensing decisions and would not be able personally to devote the time now given by the Appeal Boards to review (the Boards spend an estimated 15,000 man-hours per year, approximately 60% of that on review and 20% on opinion-writing).[203] The key question, of course, is whether it is necessary to spend so much time on review. It is difficult in light of the data to believe that the intermediate review at NRC does much more than increase acceptability of the decisional process -- it does not appear to increase accuracy and certainly does not advance efficiency. Allowing discretionary, policy-oriented review of Licensing Board decisions by Commissioners, assisted by their staffs, would seem a satisfactory alternative to the present review system.

Federal Communications Commission

The Federal Communications Commission (FCC) has adopted a highly-structured approach to review of administrative law judges' decisions, using first a review board based quite plainly on the judicial model of agency action[204] and subsequently review by the Commission members that seems based more on the political model.[205] The FCC's intermediate review board, known simply as the Review Board, currently is composed of three members, although at times it has had as many as five.[206] The Board members are assisted by a small staff of attorneys, engineers and clerical employees. Review by the Board is available as a matter of right to any party filing timely exceptions.[207] The Commission in its discretion may review decisions of the Board on request of a party or on its own motion.[208] It may decline review without opinion.[209]

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[203] Id. at 33.

[204] See 47 C.F.R. §§ 0.161, 0.361-0.365 (1982); see also discussion of the judicial model text at notes 5-6, supra.

[205] See 47 C.F.R. §§ 1.1115, 1.117 (1982); See also discussion of political model, text at note 7, supra.

[206] Letter to the author from Roberta Poindexter, Administrative Assistant to the Review Board, Sep. 30, 1983.

[207] 47 C.F.R. § 1.276(a)(1) (1982).

[208] 47 C.F.R. §§ 1.115, 1.117 (1982).

[209] 47 C.F.R. § 1.115(g) (1982).

The FCC's Review Board reflects the influence of the judicial model of agency decisionmaking. All of the Board's current members are lawyers.[210] Indeed, ten of the eleven persons who have served on the Board have been trained in law; the remaining member (one of the original four Board members) was an engineer.[211] The Commission in delegating review authority to the Board expressly limited the Board to duties not inconsistent with review of ALJs' initial decisions.[212] Further, the Board is directed, among other things, to produce in each case an opinion "signed by one of its members, who shall be responsible for its preparation."[213] There is no provision in the FCC rules--and apparently these rules are observed in practice--for the Chairman, Commissioners, General Counsel or other FCC staff to communicate with Review Board members about FCC policy or adjudication issues, except that the Bureaus that are parties to proceedings may, like all parties, communicate with the Board by formal written submissions served on all other parties.[214] The Board's operation is fairly similar to a court's:

> When exceptions, briefs and related pleadings have been filed, the Board begins its study of a case, and if one or more of the parties has requested oral argument, argument is scheduled before a panel of the Board. Panels, which consist of three Board members, are assigned in rotation. Although neither the Act nor the Commission's Rules requires that oral argument be held if requested, it is the Board's practice to grant all such requests. Following argument, the panel meets to decide the case, and one of them is assigned, this also on a rotating basis, to be responsible for the preparation of the decision. He may supervise the writing of the decision or he may write it himself, which he frequently does. When the decision meets his approval and that of the other panel members, it is adopted and published. The professional staff assists the Board in preparation for oral argument and in the

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[210] See FCC News Releases Nos. 01868, Nov. 20, 1980; 096659, Feb. 4, 1981; and 003419, Sep. 17, 1981.

[211] See Releases cited supra note 210, and FCC News Releases Nos. 21096, June 8, 1962; 68215, May 17, 1971; 22897, June 12, 1974; 26401, Jul. 23, 1974; 47904, Mar. 19, 1975; 01431, Nov. 7, 1980; 01868, Nov. 20, 1980; and 001792, June 25, 1981.

[212] 47 C.F.R. § 0.361(a) (1982).

[213] 47 C.F.R. § 0.361(d) (1982).

[214] See Letter to the author from Sylvia D. Kessler, former Member, Review Board, Sep. 24, 1982.

drafting of decisions. The extent of the Board's review of the initial decisions is not limited; it can be virtually a de novo evaluation, but in practice the Board usually limits its study to those matters raised by the exceptions and briefs.[215]

The judicial nature of the Board also is reflected in the fact that these civil service appointments generally are held until retirement from the government. The average term of service on the Board for its first five members are in excess of twelve years,[216] and although the next three members served a relatively short average period of about six years,[217] that figure is considerably in excess of Commissioners' average tenure.[218] Moreover, the Board members, like ALJs, both have risen to a level within the civil service that makes further advancement unlikely and usually are appointed relatively late in their careers, reducing the probability that the position will be used as a springboard to higher office.[219] The typical announcement of a member's departure from the Board indicates that he or she is retiring from the government after more than thirty years of federal service.[220] These factors reduce the Board members' incentives to take account of political factors.

One aspect of the Board members' backgrounds, however, might give some cause for questioning whether the lack of Commission and staff influence comes from a desire for judicial decisionmaking or from confidence that the Board members' views on policy issues will be congruent with the views of agency members and staff. If inbreeding and a consequent lack of detachment from and objectivity about politically responsive agency decisions is the objection to selective certification for ALJs at agencies like the FCC,[221] that objection certainly could be made about members of the Review Board. Board members without exception have been long-time FCC employees. They have been assistants to FCC Commissioners and have worked in and headed various FCC divisions with substantive authority.[222] Two factors caution against interpreting this pattern as indicative of Commission efforts principally to secure officials with policy views consonant with the appointing Chairman's rather than to secure officials knowledgeable in the substantive areas subject to FCC adjudications. First, the considerably longer term for Board members than for Commissioners (and especially longer as compared to FCC Chairmen)[223] in combination with a total absence of reassignments from the Review Board to other duties within the FCC belies the policy link in Board membership. Second, many of the Board members were appointed from positions that are relatively "policy neutral." Four of the eleven members who have served on the Board were appointed from positions in the FCC's Office of Opinions and Review, the body that drafts opinions for the FCC Commissioners, and three were appointed from the office of the General Counsel.[224] Both offices serve to a greater degree than the FCC's substantive bureaus more as implementers than as formulators of Commission policy. At the same time, those offices provide experience in facets of agency adjudication that may be useful to a judicially-oriented review panel.

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[215] Berkemeyer, Agency Review by Intermediate Boards, 26 AD. L. REV. 61, 63-64 (1974).

[216] See authorities cited at notes 210 and 211, supra.

[217] See id.

[218] See STAFF OF SENATE COMM. ON COMMERCE 94TH CONG., 2D SESS., APPOINTMENTS TO THE REGULATORY AGENCIES 406-408 (Comm. Print 1976); Robinson, supra note 7, at 183-84. Of the seven FCC members serving at the time of this writing, only one has been on the Commission six or more years. If one calculates terms of service from the agency's inception, a considerably longer average is produced than has obtained recently. See STAFF OF SENATE COMM. ON GOVERNMENT OPERATIONS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION: VOL. I, THE REGULATORY APPOINTMENTS PROCESS 558 (Comm. Print 1977).

The Board's decisions are subject to review by the Commission on the Commission's own motion or on a discretionary grant of a petition for review. The grounds for Commission review are:

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219. See authorities cited at notes 210 and 211, supra.

220. See, e.g., FCC News Releases Nos. 68215, May 17, 1971 (31 years); 22897, Jan. 12, 1974 (30 years); 01431, Nov. 7, 1980 (31 years); 001792, June 25, 1981 (32 years).

[221] See ALJ Hearings, supra note 44, at 74; Davis, supra note 13, at 402-406; Miller, supra note 48.

[222] See authorities cited at notes 210 and 211, supra.

[223] One study has calculated that the average term of service for FCC Chairmen has been just over two years. SENATE COMM. ON GOVERNMENT OPERATIONS, supra note 218, at 558.

[224] See authorities cited at notes 210 and 211, supra.

> (i) The Board's findings are not supported by substantial evidence in the record as a whole; (ii) the Board's decision involves prejudicial errors of substantive or procedure law; (iii) the Board's decision is arbitrary or capricious; (iv) the Board's decision conflicts with Commission policy; or (v) the Board's decision raises a novel or important issue of law or policy which warrants Commission review.[225]

When the FCC Commissioners decide to review, they usually provide opportunity for parties to file briefs and to present oral argument. The historical pattern described by a former Review Board Chairman is for the Commission to grant less than one review petition in ten for review of Board decisions (thus, the Commission members grant review for about five percent of the Board's decisions), and to reverse, modify, or remand about three percent of the Board's decisions.[226] In FY 1978, the most recent year for which data are available, the Commission displayed a bit more interventionist tendencies: 78 initial decisions were issued by the Commission's ALJs; 24 were passed on by the Review Board (17 were affirmed); and 15 Board decisions were reviewed by the Commission.[227]

The FCC's two-step review process generally has been praised. Professor Freedman's report and the subsequent adoption of ACUS Recommendation 68-6 were based in considerable part on the favorable reaction to the FCC's adjudicatory process expressed by people involved in adjudication before the FCC.[228] The FCC's review process is neither especially quick nor especially slow for the decisions involved. On average, review takes a year and a third, a figure exceeded by only two other agencies.[229] ALJs' decisions at the FCC, however, on average take the same amount of time as review, an initial decision time exceeded by only three agencies.[230] Relative to other federal agencies, then, FCC review -- by the Board and, less frequently, by the Commission -- does not contribute disproportionately much or little to adjudications' decision time, but the review process does appear relatively productive. The percentage of initial decisions reversed at the FCC is quite high compared to other federal agencies (about one in seven decisions reviewed) while the percentage of decisions reviewed is low.[231] Thus, while review at the FCC requires substantial investments of both time and personnel, those review resources appear to be relatively well spent.

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[225] 47 C.F.R. § 1.115(b)(5) (1982).

[226] Berkemeyer, supra note 215, at 64.

[227] See ACUS STATISTICAL REPORT, supra note 1, at 115.

[228] See Freedman Report, supra note 93, at 131-37.

[229] See Review Data, Appendix 2.1, infra

[230] Id.

Perhaps the most important feature of the FCC's process using the Review Board and the Office of Opinions and Review is that time is freed for the Commissioners to concentrate on policy issues either in the limited number of adjuciations the Commissioners dispose of or in rulemaking proceedings. The FCC has in recent years engaged in quite a few rulemakings of industry-wide significance, in some cases of importance to several industries.[232] The increasing use of rulemaking to set policy has been praised by some commentators and may be a direct result of the Commission's ability to shift some of the review load to staff.[233] Despite the recent decision by Congress that two of the FCC's seven Commissioners are superfluous, the FCC does have broad regulatory powers over telecommunications common carriage, including a burgeoning group of specialized services and new delivery technologies, and over broadcasting, including broadcast by satellites, and from time to time has asserted jurisdiction over related communications media.[234] Any structure that gives Commissioners the ability to concentrate on more general matters of policy seems beneficial in this context so long as the Commissioners and those who deal with the FCC are relatively satisfied with the competence of the intermediate decisionmaker.

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[231] Id.

[232] See, e.g., First Report and Order on Subscription TV Program Rules, 52 F.C.C.2d 1 (1975), reconsideration denied, 54 F.C.C.2d 797 (1975), rev'd, Home Box Office v. Federal Communications Comm'n, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829; Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 951 (1979); Cable Television Syndicated Exclusivity Rules, 79 F.C.C.2d 663 (1980).

[233] Among the more notable paens to rulemaking are K. DAVIS, DISCRETIONARY JUSTICE 56-57 (1969), and Judge Skelly Wright's opinion for the court in Naional Petroleum Refiners Ass'n v. Federal Trade Comm'n, 482 F.2d 672 (D.C. Cir. 1973).

[234] See Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq. (1976); Midwest Video Corp. v. Federal Communications Comm'n, 440 U.S. 689 (1979).

Identifying just why these groups are satisfied with the intermediate decisionmaker--why the combination of a judicial intermediate review board and certiorari-type Commission review works fairly well at the FCC--however, is difficult. Although casual observation of a problem as multi-faceted as this cautions against certainty in proposing explanations, the nature of the decisions at issue may be the critical factor. The adjudication caseload at the FCC is both substantial and varied, involving routine licensing decisions, a heterogeneous group of enforcement actions, ratemaking proceedings that range from simple to extraordinarily complex, and reparations proceedings akin to private lawsuits. Most of these cases involve important issues of fact, and some require considerable technical expertise in making decisions on factual issues. In many categories of FCC adjudication, the policy issues seem to be resolved at the level of the substantive bureau that decides whether to press for an adjudication, with the decision not to pursue a case the staff's lever for implementing policy.[235] In two sorts of cases this does not seem to be true, but those cases may illustrate by way of exception why the general run of FCC adjudications seems well suited to a judicial resolution subject to a "loose" policy check. One sort of exceptional case is a major ratemaking proceeding such as many of those involving AT&T. So many policy issues and fact issues are inextricably intertwined in those cases that the decision to examine a tariff cannot alone account for much of the policymaking. Yet it may serve the political interests of all FCC Commissioners to have more than one level of well-trained, dispassionate fact-sifters attempt to identify and resolve the numerous fact issues involved before the policy issues are addressed. Moreover, in the context of so complex a case, the relatively simple policy issues -- basically presenting questions of the extent to which competition should be promoted and theextent to which some services should be subsidized by others[236] -- may be more easily resolved apart from the fact issues.

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[235] One area in which such discretion is exercised involves complaints that the fairness doctrine has been violated. See, e.g., Fairness Report Reconsideration, 58 F.C.C.2d 691, 708-11 (1976) (Comm'r Robinson, dissenting); see also Powe, "Or of the [Broadcast] Press," 55 TEX L. REV. 39, 52-53, n. 97 (1976).

[236] See, e.g., American Telephone & Telegraph Co., 38 F.C.C.2d 213 (1972); see also COMPTROLLER GENERAL, REPORT TO THE CONGRESS -- DEVELOPING A DOMESTIC COMMON CARRIER TELECOMMUNICATIONS POLICY: WHAT ARE THE ISSUES? (1979); 1 A. KAHN, THE ECONOMICS OF REGULATION 156-77 (1971).

A second sort of FCC case that does not seem well suited to resolution by non-policymaking personnel is the decision among competing applicants for a broadcast license,[237] where the basis for choosing among applicants is nowhere clearly articulated in meaningful fashion. Many commentators who have examined the FCC's comparative licensing process have questioned its rationality.[238] One former commissioner has labelled the process an exercise in "regulatory futility," observing:

> ...the central problem of the broadcast licensing process has been the FCC's inability to develop clear and meaningful selection criteria (in terms of licensee performance or public interest aconcerns), particularly in choosing among competing broadcast applicants. This absence of standards has yielded confusing and inconsistent results as well as inefficient procedures.
>
> There is nearly unanimous agreement both within and outside the agency that something ought to be done to improve the comparative hearing process, but little agreement on what that something should be. Though largely unsuccessful, the Commission itself made some modest efforts in 1965 to clarify its standards on comparative broadcast licensing....Though some changes perhaps could be made that would simplify and clarify the selection standards, I doubt that the results would justify the effort. At bottom, what is needed is not merely clarity but also relevance. It would be relatively simple to devise criteria to separate one applicant from another. The difficulty lies in matching these criteria with some demonstrable public purpose that the selection will further.

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[237] *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965); Broadcast Renewal Applicant, 66 F.C.C.2d 419 (1977).

[238] H. FRIENDLY, *supra* note 98, at 5-23, 54-57; Anthony, *Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings*, 24 STAN. L. REV. 1 (1971); Geller, *The Comparative Renewal Process in Television: Problems and Suggested Solutions*, 61 VA. L. REV. 471 (1975); Robinson, *supra* note 7, at 237-43; Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC and the Courts*, 888 YALE L.J. 717, 732-56 (1979).

> For the most part, the quality of the licensing applications that the Commission examines is meaningful only in terms of thresholds. That is, an applicant's technical and business personnel, its ascertainment of community interests, and its engineering and programming proposals will fall either above or below some minimum level of acceptability. To go beyond an inspection of these basic qualifications produces nothing but a senseless waste of the applicant's and the FCC's reources. Yet confining the Commission's examination to these basic matters that may have some meaningful effect on performance almost invariably provides an insufficient basis for making the choice among competing applicants. The Commission's hearing process rarely will disqualify on the grounds of a basic deficiency an applicant who survives the initial staff scrutiny that precedes the hearing. It is even less likely that this process will eliminate all but one applicant.
>
> Absent meaningful distinctions among applicants, the Commission's choice among them, perforce, will be arbitrary. Arbitrariness per se is not necessarily a bad thing: the government does many things arbitrarily. But if a government agency must make an essentially arbitrary choice, the arbitrariness should equate to randomness rather than to personal whim. The wheel of fortune -- a lottery -- is far preferable to the capricious preferences of bureaucrats.[239]

Recently, the FCC has proposed and Congress has passed legislation authorizing use of a lottery in place of the current system for selecting among licensees.[240]

The significance of the dispute over comparative licensing for present purposes is that, until recently, these cases were excepted from Review Board jurisdiction.[241] The area where the Commission's performance was worst in terms of identifying useful criteria, making relevant policy choices in advance, was thought by the FCC to be ill-suited to a judicial review such as the Board's. The policy decision in this area have been made on an ad hoc basis, generally through exercise of the Commission's freedomto characterize facts in a manner suiting its intuitive political judgment.[242] Not coincidentally, this seems to be the class of cases in which FCC reversal of ALJs has been most frequent.[243] Plainly matters as to which policy choices cannot be spelled out ex ante are inappropriate for resolution by agency personnel whose job structure makes them relatively insensitive to the desires of the agency's policymaking officials. That this class of cases only now is being brought within the Review Board's jurisdiction, at a time when the FCC is moving toward spelling out certain policy choices and leaving to random selection the task of choosing among candidates who clear the basic hurdles, may be the best indication of why review at the FCC seems to have worked well.

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[239] Robinson, supra note 7, at 238-40 (footnotes omitted).

[240] See 47 U.S.C. § 309(i), initially added by the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 736. The FCC declined to implement the lottery provision, finding a variety of flaws in the new process. See Random Selection/Lottery Systems, 89 F.C.C.2d 257 (1982). Congress subsequently amended the lottery authorization. Pub. L. No. 259, 97th Cong., 2d Sess., 96 Stat. 1094 (1982).

Department of Interior, Board of Land Appeals

The Department of the Interior's administrative law judges decide over 1,100 cases per year in adjudicatory proceedings involving a wide variety of claims.[244] Most of these decisions are subject to review by one of four departmental appeal boards, each with a discrete subject matter jurisdiction.[245] The most prominent of these boards is the Interior Board of Land Appeals (IBLA), which is charged with deciding appeals "relating to the use and disposition of public lands and their resources."[246] The cases reviewed by the IBLA involve a large number of different statutory provisions respecting the use of public lands, covering subjects as diverse as grazing rights to pasture land and mineral rights to submerged land located on the Outer Continental shelf.[247] This heterogeneous collection of cases subject to IBLA jurisdiction generally involves contests over the validity of specific claims to the use of lands or associated resources.[248] Not infrequently, the cases involve disputes over matters such as when a claimant discovered certain minerals on public lands and what steps were taken to establish the claim and to develop the resources,[249] or whether the terms of a grazing permit have been violated.[250] The extent to which disposition of these contests requires resolution of more general questions of appropriate land and resource use has been a matter of some controversy. The suggestion has been made that the IBLA is the Department's principal policymaking body on the land use matters.[251] Board

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[241] See Amendment of Delegation of Authority to Review Board, 88 F.C.C.2d 377 (1981).

[242] See, e.g., Cowles Florida Broadcasting, Inc., 60 F.C.C.2d 372 (1976), vacated and remanded sub nom. Central Florida Enterprises, Inc. v. Federal Communications Comm'n, 598 F.2d 37 (D.C. Cir. 1978); modified and reh. en banc denied, 598 F.2d 58 (D.C. Cir.); pet. for cert. dismissed, 441 U.S. 957 (1979); reinstated, 86 F.C.C.2d 994 (1981), affirmed, 683 F.2d 503 (D.C. Cir. 1982). See also Star Television, Inc. v. Federal Communications Comm'n, 416 F.2d 1086, 1089, 1094-95 (D.C. Cir.) (Leventhal, J., dissenting), cert. denied, 396 U.S. 888 (1969).

[243] See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 405-406 (1965) (Statement of Comm'r Lee).

[244] See ACUS STATISTICAL REPORT, supra note 1, at 184-203.

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245. These are the Board of Land Appeals, Board of Surface Mining Appeals, Board of Indian Appeals, and the Teton Ad Hoc Appeals Board. 43 C.F.R. § 4.1(b) (1982). The Board of Contract Appeals hears cases disposed of initially by contract officers, not ALJs. Id. A sixth board, the Alaska Native Claims Appeals Board, was recently abolished. See 47 Fed. Reg. 26, 392, June 18, 1982. The review process for claims within the jurisdiction of the Board of Surface Mining Appeals is described infra, see text at note 345; the review process for cases outside the boards' jurisdiction is described in category 20 of Appendix 1 to Part III, infra.

246. 43 C.F.R. § 4.1(b)(3) (1982).

247. See id.; see also 30 U.S.C. §§ 22, 29 (1976); 43 U.S.C. § 315 (1976); 43 C.F.R. §§ 3300-3340 (1982).

248. See ACUS STATISTICAL REPORT, supra note 1, at 185-88, 190.

249. See 43 C.F.R. §§ 3861-3872 (1982).

250. See 43 C.F.R. §§ 2120.0-3, 2920.9-3 (1982).

251. Strauss, Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law, 74 COLUM. L. REV. 1231, 1235, 1254-65 (1974).

members have reacted sharply to this suggestion.[252] Indeed, one IBLA member, serving as Acting Director of the Office of Hearing and Appeals (OHA), the departmental division that encompasses the administrative law judges and boards of appeal, took pains to note in a report on the organization and operation of OHA and the appeal boards:

> Implicit throughout this paper is the assumption that the Boards of Appeal within the Department were not and are not intended to make policy, but rather to apply existing policy and law to the facts of each case. Since the author was intimately involved in the creation of the Office of Hearings and Appeals in 1970, he can attest that this was the intention. However, the wording of the regulations delegating authority to the Boards, 43 CFR 4.1, 4.21(c), coupled with the entire language of 43 CFR 4.5, regarding the power of the Secretary, might lead one to the conclusion that the intention was otherwise.

The specific denial that IBLA makes policy reflects the critical concern with IBLA's operations: the role its adjudications play in Departmental decisionmaking.[253] Most cases ultimately heard by IBLA initially fall within the jurisdiction of the Bureau of Land Management (BLM). The Director of BLM, or one of his State Directors, usually initiates the contests or rules on claims in a manner adverse to the interests of an appealing party. The next step in the adjudication is a hearing before and decision by an ALJ. Following that, appeal lies to IBLA.[254] There is no IBLA authority to review *sua sponte*.[255] Once a case has been appealed, however, either by a private party or by BLM officials, the Board is free to review the case *de novo*.[256]

IBLA provides little opportunity for participation by the parties to the proceeding, but a set of formal procedures controls the course of disposition by the Board members. The Board is composed of eight members, seven of them attorneys and all selected from within the Department.[257] The Chief Administrative Judge who occupies a GS-16 postion, coordinates the Board's operations. Cases are assigned to individual Board members by him, with one Board member principally responsible and two other Board members comprising the panel for that case.[258] The Board may provide oral argument, but rarely does so.[259] The principally responsible Board member drafts an opinion or oversees its drafting by a staff attorney, then circulates the opinion to the other panel members. Once two members agree on an opinion, the opinion (and dissent if there is one) is circulated to all IBLA members for comment.[260] The Board's Chief Administrative Judge or any three other IBLA members can block issuance of a decision until the Board can meet and decide whether to consider the case en banc, to modify the decision without further discussion, or to let the panel's decision stand.[261]

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[252] *See* Frishberg, Hickey & Kleiler, *The Effect of the Federal Land Policy and Management Act on Adjudication Procedures in the Department of the Interior and Judicial Review of Adjudication Decisions*, 21 ARIZ. L. REV. 541, 554 n.58 (1979).

[253] DEPARTMENT OF THE INTERIOR OFFICE OF HEARINGS AND APPEALS, BOARDS OF APPEAL WITHIN THE OFFICE OF HEARINGS AD APPEALS 34 (1977) [hereafter INTERIOR REPORT].

[254] *See* 43 C.F.R. §§ 4.400-4.476 (1982).

[255] INTERIOR REPORT, *supra* note 253, at App. C, p.i; *see* 43 C.F.R. §§ 4.1(b)(3), 4.410 (1982).

While the decision and review process at Interior has been criticized, it has not been contended that IBLA review takes too long or yields too little. The review process at IBLA takes about seven months,[262] a figure that would place it near the middle of the pack, faster than 13 agencies but slower than 11.[263] Interior does not provide data on the time taken for ALJ decisions, but the Department's relatively large caseload per ALJ (about 85 cases per ALJ per year, the sixth highest caseload) supports an inference that ALJ decision time should be short.[264] If the caseload from which appeals to IBLA are drawn

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256. INTERIOR REPORT, supra note 253, at App. C, p.i; see 43 C.F.R. § 4.477 (1982).

257. INTERIOR REPORT, supra note 253, at App. C, and attachments.

258. Id., at App. C, p.i.

259. Id. See also 43 C.F.R. § 4.25 (1982); Strauss, supra note 251, at 1255.

260. INTERIOR REPORT, supra note 253, at App. C, p.ii.

261. Id.

262. Id. at p.iii.

263. See Review Data, Appendix 2.1 infra.

264. See ACUS STATISTICAL REPORT, supra note 1, at 21, 185-89; Review Data, Appendix 2.1, infra.

is not significantly different from the departmental caseload generally, the review time at IBLA may be higher than would be expected for the difficulty of its cases, but not dramatically so.[265] The IBLA's rate of reversal of ALJ decisions (almost eight percent) would rank tenth out of twenty-five agencies, and in a much higher percentage of cases (twenty percent) the Board either modified a decision or remanded it.[266] Appeal to courts from IBLA decisions has not produced a reversal rate sufficient to cast doubt on the Board's contribution to accurate decisionmaking.[267]

The argument over IBLA decisionmaking does, nonetheless, concern an aspect of accuracy: the question raised is how well the decisions of bureaucratic officials who are relatively insulated from policymaking officials comport with the interpretations of statutory provisions that those persons expressly charged with formulating agency policy would give.[268] The criticism of the review process is linked to other criticisms of Interior department decisionmaking--that insufficient attention is paid to general policy decisions, that too little use is made of rulemaking.[269] Even taking other deficiences for granted, the contention advanced is that IBLA decisions necessarily make departmental policy without any control by officials suited to perform the policymaking function. The point is made forcefully by Professor Strauss:

> Particularly striking is the absence, even in cases in which significant policy questions are presented, of any explicit provision for secretarial control over the Board's policy conclusions to assure coherence and intelligibility in the Department's interpretive application of the mining laws. The Board, like the Office of Hearing and Appeals generally, was created in response to the pressure of criticism from the private bar that policy and adjudication functions in the Department were too closely linked; with its creation, division of function became complete. Members of the Board,

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[265] *See* ACUS STATISTICAL REPORT, *supra* note 1, at 185-90; *Review Data*, Appendix 2.1, *infra*.

[266] *See* INTERIOR REPORT, *supra* note 253, at Attachment to App. C; *Review Data*, Appendix 2.1, *infra*.

[267] *See* INTERIOR REPORT, *supra* note 253, at App. C, p.iii.

[268] *See* Strauss, *supra* note 251.

[269] *See* *id*.

although typically drawn from within the Department, are almost completely isolated from contact with the rest of the Department once on the Board.... The point is strongly made in the Department's regulations that Government counsel appearing before the Board of Land Appeals "shall represent the Government agency in the same manner as a private advocate represents a clients," [43 C.F.R. § 4.3(b)] and that there shall be no oral or written ex parte communication between "any" party and a member of the Office of Hearings and Appeals concerning the merits of a proceeding. [43 C.F.R. § 4.27(b)] The result of these procedures is that departmental officials can argue policy matters--the desirability of overruling outdated or erroneous departmental precent, for example--only through their briefs. The general operating divisions of the Department have no control over the outcome and cannot impose their policy preferences, except by previous adoption of a rule.

The isolation of the Bureau of Land Management ostensibly the principal source of policy concerning mining matters, is particularly dramatic. Before creation of the Office of Hearings and Appeals, the Bureau played a decisive role in litigative as well as in legislative approaches. Provision for an intermediate appeal to its Director from the hearing examiner's decision permitted the Bureau a measure of policy control. The Bureau's function as intermediate appellate body was eliminated, however, because it was viewed as a source of oppressive delay and an example of the combined functions which the proponents of reform believed must be separated. The result was isolation of the Bureau from any contact with a case once a complaint had been made and answered (and perhaps, evidence had been given by Bureau experts). While rules and Manual directives come into being though the Bureau's labyrinthine corridors, the prosecution of litigation is entirely in the hands of the Solicitor's Office; adjudication, with its policy ovetones, belongs to the Office of Hearings and Appeals and its Board of Land Appeals. To the extent policy in mining matters is made by decision rather than rule, the higher levels of the Bureau no longer contribute significantly to its formulation.

To be sure, the independence of the Board, like other tribunals of the Office of Hearings and Appeals, is not without formal limit; the Secretary retains his power of personal decision. The regulations, however, make no formal provision for secretarial review; rather, they state that no departmental appeal will lie from a decision of an appeals board....

Certain informal lines of communication do exist--incursions, perhaps necessary ones, on the spirit if not the letter of the

> rule that the Department appears before the adjudicatory body "as a private advocate." Private communications between the Department and the Director of the Office, who does not ordinarily sit on appeals, have been quite free.
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> While there is some debate whether he is ever approached on the merits of policy matters, the Director will be told if a particular matter is regarded as "important," and is occasionally asked either to have matters considered en banc or to place himself, ex officio, on the panel. The effect is to underscore the policy implications of the particular case. Communication exists as well in the opposite direction: departmental regulation or forms which by their obscurity have proved particularly productive of litigation are called to attention, sometimes with suggestion for changes that might produce greater clarity or otherwise reduce the litigative workload. And the opinions themselves, concrete examples of the Board's independence, may produce a somewhat greater incentive at higher levels in the Department to act by rule.
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> The total picture, however, remains quite different from one's ordinary expectations about the choice between rulemaking and adjudication. Instead of a single decider, rationally or irrationally allocating choices between the two procedures and itself making the fundamental policy decisions whichever mode is chosen, one finds a frequently unconscious process of allocation and, more important, a process which leads ultimately to different authorities.[270]

OHA officials do not claim that IBLA is integrated into the department's policymaking structure. Indeed, they admit to some difficulty in ascertaining policymakers' views. The OHA officials argue, however, that they do not make policy decisions, that because of their past experience in the department as well as communication with current policymakers, they generally are able to ascertain and implement department policy, and when they get it wrong, they correct it:

> While solving the problem of procedural due process, independent boards of appeal within the Department (and all agencies) raise other problems. The Solicitor, in addition to being the Department's chief legal officer, has traditionally and properly enjoyed a close associaton with the Secretary. So have the various Assistant Secretaries and Bureau Directors. It is entirely natural, therefore, for the Secretary, the Solicitor, the Assistant Secretaries and members of their staffs to look with suspicion at a system that bypasses the very officials upon whom the Secretary most relies for legal advice and policy guidance on an almost daily

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[270] Id. at 1256-58 (footnotes omitted).

basis. These officials and their immediate staffs are Presidential or Secretarial appointees. Not so the members of OHA. With the exception of the Director, all are members of the career bureaucracy. An incoming, policy-making, Presidential appointee might well feel like a capitve, and view OHA as the tail that wags the dog.

Because OHA is functionally separate from members of the Secretariat, the Solicitor's Office and the Bureaus, it is not always immediately privy to recent policymaking decisions. Conversely, when various Boards of Appeals have requested policy guidance from the Secretariat, it has been difficult in some cases to obtain a response. On some occasions, the request was routinely transmitted to the Solicitor's Office, thus totally frustrating the purpose of the system.

One of the primary reasons for making the Director of OHA a political appointee was to ensure the responsiveness of the entire office to the policies of the existing administration. But this can only succeed if the Director is included in, or at least informed of, policy decisions, communicates them in turn to the Boards and the Hearings Division, and receives in turn a response to his questions regarding policy from the appropriate policy maker.

The Solicitor, Assistant Secretary and Director, BLM, would seem to be more aware of recent departmental policy regarding public lands than the Board of Land Appeals. Thus, there is a conflict between administrative fairness and review by the policymaker himself. But the conflict is not irresolvable, and the problem is more apparent than real. In the 6 1/2 years since the Board of Land Appeals has been in existence, the Board has not been aware of serious dissatisfaction on the part of the BLM. Of course, six of its present members had extensive public land experience, either with BL, or the Solicitor's Office, before coming to the Board. Some of its decisions may have created difficulties, many have been welcomed.

. . . [W]here BLM is unhappily surprised by a Board reversal of one of its decisions or the decision of an administrative law judge, it may and it has petitioned for reconsideration or appealed the ruling of the administrative law judge. On more than one occasion the Board has changed its decision on reconsideration after a more comprehensive presentation of the Bureau's position was made.[271]

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[271] INTERIOR REPORT, supra note 253, at 32-33 (footnote omitted).

By and large, the complaints about IBLA decisions seem endemic to the bifurcation of adjudication from other agency decisionmaking. On balance, the present system's faults do not seem easily correctable if one feels uncomfortable with a relatively complete integration of all agency functions. Several factors appear to make the current decision and review structure sensible, albeit not perfectly acceptable for all involved. First, the Department of Interior is a large agency with many functions and the agency head cannot reasonably be expected to be personally involved in the bulk of departmental adjudication, even at the review level. Second, delegation of review authority to relatively "judicial" officials has fairly low cost in the cases at issue. While the policy component of some proceedings (such as resolution of claims for arguably conflicting uses of public land,[272] as distinguished from resolution of the technical validity of claims[273]) is significant, and most proceedings have some policy implications, the cases reviewed by IBLA appear largely to raise factual issues that either are or at relatively low cost can be shielded from major policy effect.[274] The real complaint on this score is not that review need include more policymaking personnel but rather that when adjudications conflict with departmental policy -- actually or potentially -- steps need to be taken by the department's policymaking officers to correct the errors. Rulemaking may be a suitable vehicle for effectuating most of these corrections.[275] Finally, the department does provide opportunity for policy input from policymaking officials in the adjudication-review process.[276]

Other steps that might admit of correction of IBLA errors in policy divination at lower cost than rulemakings or petitions to IBLA for rehearing (a process that requires education of IBLA officials, on the policy implications of their decision on the disagreement between IBLA and the policymaking officials, and on the reasons why the IBLA position should be abandoned) may be found. One such step would be to replace IBLA officials with more politically-responsive reviewers. The yield of this move in policy harmony is not likely to be great, however, and it flies directly in the face of the objections that led to creation of the Board as presently organized.[277] Another step toward low-cost policy control is to allow some policymaking official whose time and attention are less in demand than the Secretary's to oversee IBLA decisions. But the Department's rules in essence do this. Admitting that the theoretical possibility of secretarial review is not a realistic control, still the Director of OHA is a political appointee with power to call attention to perceived policy problems in proposed IBLA decisions,[278] and the Solicitor can issue rulings that the IBLA considers binding.[279] At bottom, complaints about IBLA operation appear premised on a rejection of the judicial model of agency adjudication, even in the modified form adopted by the Department of Interior.

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[272] *See* 30 U.S.C. § 22 (1976); 43 C.F.R. § 3871 (1982).

[273] *See* 30 U.S.C. § 29 (1976); 43 C.F.R. §§ 3861-3864 (1982).

[274] *See* Frishberg, Hickey and Kleiler, *supra* note 252; Strauss, *supra* note 251, at 1269.

[275] *See* *id.* at 1264-69.

[276] *See* INTERIOR REPORT, *supra* note 253.

Department of Agriculture

The Department of Agriculture regulates a wide variety of practices in the production, handling, and marketing of agricultural products, animals, and animal products.[280] Adjudications at the Department generally address allegations that departmental rules or related statutory provisions have been violated.[281] These enforcement actions often are associated with licensing programs, with the adjudicatory proceeding cast in the form of modification suspension, or revocation of a permit to engage in certain regulated activities.[282] Proceedings also may result in orders to cease and desist from specified practices on the threat that noncompliance will result in license revocation. In cases outside the Department's licensing authority, as well as some cases involving licensees or permittees, monetary penalties may be imposed for violation of regulatory or statutory command.[283]

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[277] See Frishberg, Hickey & Kleiler, supra note 252, at 545-53.

[278] INTERIOR REPORT, supra note 253, at 32.

[279] Id. at 33.

[280] See proceedings listed at 7 C.F.R. § 1.131(1) (1981).

[281] See, e.g., 7 C.F.R. §§ 47.2-47.68 (1983).

[282] Id.

[283] E.g., Horse Protection Act of 1970, 84 Stat. 1406, 15 U.S.C. § 1828 (1976); Packers and Stockyards Act, as amended, 90 Stat. 1249, 7 § 213(b) (Supp. IV 1980).

The Department's resolution of these disputes generally fits the judicial model of agency decisionmaking. Trial-type hearings are held before one of the Departament's five ALJs, and review is available to any party as a matter of right.[284] The reviewing official is the Department of Agriculture's Judicial Officer.[285] The Judicial Officer has no authority to review sua sponte, but he does review matters de novo and has authority to enlarge the issues on appeal to include all he thinks appropriate to disposition of the case.[286] The Judicial Officer is a high-ranking (GS-17) civil servant, a long-time employee of the Department.[287] The position has not been filled by former administrative law judges, and the Judicial Officer is appointed by the Secretary of Agriculture, so presumably he is conversant with and attuned to at least those aspects of departmental policy the Secretary considers important to agency adjudications. Whatever policy connection he may have had before appointment, however, is severed on selection as Judicial Officier, since the Department has a fairly strict rule against ex parte contact with Judicial Officers, as well as with ALJs, by persons within the Department or without.[288] Moreover, the appointment as Judicial Officer apparently runs for the duration of the appointee's government career.[289] The decision of the Judicial Officer is final.[290] The Secretary has retained authority neither to review on his own motion nor on request of a party.

The opportunity, thus, is presented for the judicial operation of the decision and review process to conflict with the more "political" operation of the Department's substantive bureaus.

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[284] 7 C.F.R. § 1.145(a) (1981).

[285] Id.; 7 C.F.R. § 2.35 (1981).

[286] 7 C.F.R. § 1.145(h) (1981).

[287] Letter to Richard K. Berg, General Counsel, Administrative Conference of U.S., from Donald A. Campbell, Judicial Officer, U.S. Dept. of Agriculture, Feb. 24, 1983.

[288] 7 C.F.R. § 1.151 (1981).

[289] This seems to have been the Department's practice and shows no sign of abating -- the present Judicial Officer already has served twelve years in that position -- but there is no departmental rule governing the Judicial Officer's tenure of office. See Letter, supra note 287, at 3.

[290] 7 C.F.R. § 1.145(i) (1981).

The bifurcation of administrative processes at Agriculture, however, does not seem to have produced complaints from inside or outside the Department. There may be little objection to dispensing with secretarial review because the press of other duties makes that a high cost process, requiring that the Secretary take time from other matters and perhaps entailing delay in review or causing the Secretary to give less attention to review than is given by a Judicial Officer without other responsibilities.[291] The data on Judicial Officer review at Agriculture support the notion that his review is both expeditious and serious. Review takes less than half as long as the initial decision,[292] and the Judicial Officer reverses the ALJ's decision nearly one time in ten.[293] The value placed on the opportunity for review may be reflected in the fact that parties seek review in almost half the cases decided by the Department's ALJs.[294]

While the data indicate that Judicial Officer review is relatively quick and intense, these factors are not a complete explanation for satisfaction with this process. Some consideration of alternative review methods is necessary to understand acceptance of the present system. Assuming that secretarial review of all ALJ decisions would entail compromise on either the speed of review or attentiveness of the reviewer does not compel the conclusion that all alternatives to review by a policy-insulated figure such as the Judicial Officer are less attractive. Plainly, the Secretary could delegate the review function to someone less insulated from policymaking than the Judicial Officer. The degree to which the review process involves "economies of scale" -- more efficient review being associated with a specialization in that task -- may impose limits on the policy-connectedness of the reviewing official, but more integration into the policymaking structure than characterizes the Department's Judicial Officer clearly is possible.

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[291] Cf. Freedman Report, supra note 93, at 131-32 (offering a similar explanation for acceptance of the FCC's Review Board). An indication of the range of departmental activities for which the Secretary has overall responsibility can be gleaned from the U.S. DEPARTMENT OF AGRICULTURE, REPORT OF THE SECRETARY OF AGRICULTURE (1981).

[292] See Review Data, Appendix 2.1, 2.4 infra.

[293] Id. The information on the Department contained in Appendix 2 to Part III is based on ACUS STATISTICAL REPORT, supra note 1, which is a compilation of data submitted by the various bureaus using ALJs. The current Judicial Officer at Agriculture, however, believes the information regarding reversal of ALJ decisions to be erroneous or outdated. He would place the reversal figure at closer to one reversal (or substantial modification) for every two cases heard in the last three years. Letter, supra note 287.

[294] See Review Data, Appendix 2.1, 2.4, infra.

Some measure of the success of review at Agriculture, thus, inevitably must rest on acceptance of judicial treatment as appropriate to the matters being adjudicated. The cases subject to review by the Judicial Officer to a significant degree present disputes over issues of fact,[295] although by no means are these necessarily simple issues. The Department's regulations on most subjects are incredibly detailed. For example, regulations adopted pursuant to the Packers and Stockyards Act[296] filling ten pages in the Code of Federal Regulations detail procedures for weighing poultry, including the sort of scales to be used, how the scale is to be balanced, adjusted, tested, repaired, and read,[297] and when to weigh and re-weigh.[298] The room for policy judgments in adjudication of disputes over rule violationsobviously is minimized when rules are this precise. Of course, policy judgments still are strongly implicated in deciding not whether a rule has been violated but whether to take action against the violator. To a large extent, however, these policy judgments are made by the Department's non-judicial officers who decide when to initiate a proceeding and when and on what terms to withdraw or settle a case. The liberal use of this power is reflected in the fact that roughly seven times as many cases are initiated as are pursued to initial decision.[299]

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[295] As intimated above, the separation of "fact" from "policy" issues is by no means an easy task, and there is considerable room for difference in the characterization of any dispute. See text at notes 6-61 supra; see also Robinson, supra note 23, at 503-506; Nathanson, Book Review, 70 YALE L.J. 1210, 1211 (1961). The Judicial Officer at Agriculture demurs from the statement that adjudications at the Department largely raise issues of fact, emphasizing instead the "policy" issues involved in his decisions, including the appropriate sanction to impose where violations have been found. Letter, supra note 287. That the decisions of Agriculture's ALJs and Judicial Officer involve some matters closer to policy than fact is undeniable. Whether one or the other is preponderant is admittedly difficult to say. Still, as compared to other bureaus, the Department of Agriculture seems to have crystallized into rule form many of the broader policy issues committed to it by statute, transforming many such matters into contests over facts at the adjudicatory level.

[296] 42 Stat. 159, codified at 7 U.S.C. § 181 et seq. (1976).

The Department has not been able to formulate precise rules in all areas. For instance, one charge to the Department under the Agricultural Adjustment Act, as amended, is "to establish and maintain such orderly marketing conditions for [certain] agricultural commodities in interstate commerce . . . as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof ... [and] avoid unreasonable fluctuations in supplies and prices."[300] Various provisions in the statute spell out in greater detail the procedures to be followed but require fidelity to the vague standard quoted above.[301] The Act also gives additional ambiguous instructions, such as the requirement, in defining when agreements among industry members on marketing practices (marketing agreements) will be appropriate, that approval be obtained from a certain percentage of industry members who engaged in the business during a "representative period."[302] The sorts of political judgments called for in implementing this legislation are not readily reducible to rules, and the general language of the statute has not been explicated in the Department's regulations.[303] By the same token, the judgments have not been left principally to nonpolicymking personnel. Although appeals from ALJ decisions on petitions for relief from marketing orders are to the Judicial Officer, the Secretary renders the orders respecting marketing agreements.[304] The review accorded these cases does not appear distinguishable from that granted other adjudications at Agriculture. In the period FY 1976 - FY 1978, ALJs passed on thirteen petitions for relief from marketing orders.[305] All thirteen were appealed; ten were affirmed; one was reversed, one modified, one remanded.[306] The average review time was less than one-third the time taken to reach the ALJ's initial decision.[307]

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[297] 9 C.F.R. §§ 201.106-201.108 (1982). The following excerpt is typical:

> (2) Test procedure-weighbeam scales - (i) Error determination. The most precise method of determining the errors during the testsof a vehicle scale equipped with a weighbeam is known as the error-weight procedure. This method is explained in the following paragraphs.
>
> (ii) Zero-load balance. With all poises at zero, accurately balance the scale at zero with at least 50 pounds of small denomination weights on the platform. These error weights will be used to accurately measure errors and balance changes during the test.
>
> (iii) The SR (sensitivity reponse). The SR value at zero load shall be determined by increasing or decreasing the amount of error weights on the platform until the appropriate change in the rest point of the weighbeam or balance indicator is obtained. On scales equipped with balance indicators a change in load equal to the minimum weighbeam graduation shall change the position of rest of the balance indicator 0.25 (1/4) inch or the width of the central target area, whichever is greater. On scales not equipped with a balance indicator a change in load not to exceed the value of two minimum weighbeam graduations shall move the weighbeam from a position of rest in the center of the trig loop to a position of rest either at the top or bottom of the trig loop. . . .

9 C.F.R. § 201.106-1(g)(2) (1982).

[298] 9 C.F.R. § 201.109-201.110 (1982).

[299] See Review Data, Appendix 2.1, 2.4 infra.

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[300] 7 U.S.C. § 602(1), (4) (1976).

[301] *E.g.*, 7 U.S.C. § 608(c) (1976).

[302] 7 U.S.C. § 608(c)(8) (1976).

[303] *See*, *e.g.*, 7 C.F.R. § 900.3 (1982).

[304] 7 C.F.R. § 900.13a (1982). Adjudications involving petitions for relief from marketing orders appear to be excluded from the class of cases subject to Judicial Officer review, and review authority instead seems to have been retained by the Secretary. *See* 7 C.F.R. §§ 1.131, 2.35 (1981); 7 C.F.R. §§ 900.65, 900.66 (1982). The information concerning the Department's review processes submitted to the Administrative Conference was so construed, *see* ACUS STATISTICAL REPORT, *supra* note 1, at 49, and the cases involving these petitions have been treated in the Appendices to this Report as instances of agency head review. The Judicial Officer, however, points out that this construction is not in accord with the Department's practices, which treat these like other adjudicatory cases with review by the Judicial Officer. *See* Letter, *supra* note 287.

Finally, in addition to the division of responsibility between the comparatively judicial Judicial Officer and the more political appointees at Agriculture, the commitment of matters to ALJs for initial decision and the manner chosen for review also seem sensible. Assuming a fairly uniform level of ALJ competence in federal agencies, the fact that the initial decisions take over fourteen months on average, a figure exceeded by decisions at only five other agencies, is consistent with belief that significant issues of some difficulty are presented in the Agriculture department's adjudications. It is not difficult to justify utilizing someone skilled at making factual decisions where complex factual issues are in dispute. The fact that the Department's cases are not predominantly simple, single-issue cases but rather cases of some complexity and, judged by the parties' investment in the proceedings, not inconsiderable value similarly supports the opportunity for review, even though that process adds six more months to decision time.[308] On all grounds, then, adjudication at Agriculture receives high marks.

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[305] See Review Data, Appendix 2.4, infra.

[306] See ACUS STATISTICAL REPORT, supra note 1, at 48-49.

[307] Id.

[308] Id.

APPENDIX I TO PART III:
AGENCY REVIEW PRACTICES BY CATEGORY

A. Review by Agency Head

1. Recommended Decision: Automatic Review

Civil Aeronautics Board: Proceedings concerning foreign air carrier permits under the Federal Aviation Act are heard by ALJs who issue recommended decisions to the Board. The Board's decision is subject to approval by the President.[309] The CAB disposed of 21 such cases in fiscal year 1978 (hereinafter FY1978).[310]

Drug Enforcement Administration: A bureau within the Department of Justice, the one administrative law judge of the DEA closed 40 cases in FY1978, issuing recommended decisions in 18 of them. Most of these cases involved denial or revocation of permits to handle controlled substances. Recommended decisions are certified to the Administrator. Of the decisions reviewed in FY1978, 19 were affirmed and only one reversed by the Administrator.[311]

Interstate Commerce Commission: In some cases involving the rates and practices of regulated motor, rail and water carriers and of freight forwarders, and in some cases involving financial transactions of these regulatees, the ICC dispenses with the normal requirement of an initial decision by the ALJ. Instead, the ALJ certifies the record to the Commission for decision and generally drafts a recommended decision that may serve as a basis for the Commission's action. Although over 400 ICC cases may have fallen in this category in FY1978, the vast majority did not proceed past the hearing stage. The large number of cases in which applications and proposals were withdrawn left only 50 cases at the review stage, 10 of which resulted in reversal. The ICC decisionmaking process is discussed in greater detail in review category 8 below.

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[309] 49 U.S.C. § 1372(f)(2) (Supp. IV 1980).

[310] See ACUS STATISTICAL REPORT, supra note 1, at 78-79. This function of the CAB will be transferred to the Department of Transportation as of January 1, 1985, pursuant to Public Law No. 504, 95th Cong., 2d Sess., § 34, 92 Stat. 1744; see 49 U.S.C. § 1551 (Supp. IV 1980).

[311] See ACUS STATISTICAL REPORT, supra note 1, at 95-101. Because decisions reviewed include some decided the prior year and less than all decided in the current year (i.e., those decided too late to allow review to be completed in the current year), the number of cases reviewed may differ from the number decided even though all decisions are reviewed.

Merit Systems Protection Board: In cases involving charges against an administrative law judge, hearings are held before the Board or an ALJ. When the ALJ presides, he issues a recommended decision which automatically is reviewed by the Board. In FY1978 jurisdiction over these cases was vested in the U.S. Civil Service Commission, and only one case was heard by the Commission's ALJ.
U.S. International Trade Commission: The Commission, with two ALJs, disposed of 10 cases in FY1978 involving alleged use of unfair trade practices in violation of the Tariff Act. Cases are certified to the Commission with the ALJ's recommended decision.

2. Review of Right

Bureau of Alcohol, Tobacco and Firearms: Proceedings under several different statutes to determine whether certain permits should be revoked are conducted before the Bureau's ALJ. The Director of the Bureau, which is part of the Department of the Treasury, reviews appeals from the ALJ's initial decision.[312] In cases involving disbarment of professionals before the Internal Revenue Service, hearings are presided over by the AT&F administrative law judge and review lies of right to the Secretary of the Treasury. This is a minor part of the ALJ's caseload, accounting for only 9 of the 88 cases closed in FY1978. Review was sought before the Secretary in only one case.

Commodity Futures Trading Commission: ALJs at the CFTC, which currently employs four administrative law judges, rendered initial decisions in approximately 200 cases in FY1978. Most of these adjudicated claims by private parties for reparations from commodity futures traders registered with the CFTC for violation of its regulations. A small number of cases (seven) involved enforcement actions by the Commission against brokers and traders. Review by the Commission is available at the instance of a party or on the Commission's own motion. The Commission acted on 15 cases in FY1978, four of which were enforcement cases.

Consumer Product Safety Commission: Proceedings to determine whether sanctions should be imposed for violation of CPSC standards or of statutes subject to CPSC enforcement are presided over by the CPSC's ALJ. His initial decision is subject to appeal to the Commission within 40 days of issuance. Nine cases were decided in FY1978, and five were reviewed by the Commission.

Environmental Protection Agency: Challenges to denial, cancellation, or suspension of registrations under the Federal Insecticide, Fungicide, and Rodenticide Act are heard before the EPA's seven ALJs. Exceptions may be taken to the ALJs' initial decisions, and review is available of right before the Administrator. The EPA's rules provide for the appointment of a Judicial Officer to exercise the Administrator's review authority,[313] and the Administrator does, indeed, frequently delegate that authority.[314] The Administrator does not, however, always delegate this authority;[315] under the EPA's rules, the authority remains in the Administrator to determine whether review of any given case is assigned to a Judicial Officer,[316] hence the inclusion of these cases under agency head review. Only two cases were decided under FIFRA in FY1978.

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[312] 27 C.F.R. §§ 200.115, 200.116 (1982). *See* notes 2 and 147 *supra*.

Federal Energy Regulatory Commission: ALJs are used to conduct hearings and render initial decisions in eight different proceedings conducted pursuant to three different statutes. These proceedings generally involve the licensing of energy operations and scrutiny of their rates and practices. Exceptions to ALJ decisions trigger review by the Commission. FERC, which employs 22 ALJs, disposed of 125 cases in FY1978.[317] The Commission reviewed 40 cases; three initial decisions were reversed, and one was modified.

Federal Labor Relations Authority: Federal Service Labor Disputes cases arising under Executive Order No. 11491, now under the purview of the FLRA, formerly were decided by an Assistant Secretary of Labor after hearing and issuance of a recommended decision by the ALJ (or in some instances by another official).

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[313] 40 C.F.R. § 164.2(k) (1983).

[314] See, e.g., Environmental Defense Fund v. Environmental Protection Agency, 489 F.2d 1247, 1250 (D.C. Cir. 1973) (indicating, on basis of submission by Respondent William D. Ruckelshaus, EPA Administrator, "normal" practice of EPA in certain permit cases is appointment of Judicial Officer.

[315] See, e.g., id.; See also Montrose Chemical Corp. v. Train, 491 F.2d 63, 65 (D.C. Cir. 1974).

[316] 40 C.F.R. § 164.2(k)(3) (1983).

[317] The FERC ranks sixth among agencies in number of ALJs and thirteenth in caseload. This disparity may indicate that FERC cases are of greater than average difficulty or complexity. The low reversal rate for ALJ decisions, see text above, may indicate that the difficulty is technical rather than a product of unclear agency goals.

In FY1978, 267 such cases were decided.[318] The FLRA regulations now governing these cases seem to accord review by the Authority as of right, stating: "After considering the Administrative Law Judge's decision, the record, and any exception . . . the Authority shall issue its decision. Provided, however, that unless exceptions are filed which are timely . . . the Authority may . . . adopt without discussion the decision of the Administrative Law Judge."[319] While this is a review process closer to that existing before establishment of the FLRA (automatic review of recommended decisions), the statute granting FLRA jurisdiction over these cases appears to authorize discretionary review by the Authority.[320]

Federal Maritime Commission: ALJs at the FMC hear a variety of cases under the Shipping Act of 1933, including enforcement actions, licensing decisions, and assessment of rates and practices (of individual maritime enterprises and of agreements between enterprises). As with the FLRA, statute and regulation present different views of the review process. The Appendix to Title 5 of the United States Code contains the Reorganization Plan of 1961, §105 of which, provides for discretionary review by the FMC of the ALJs' initial decisions. The Commission's rules, however, grant without qualification a right of review on filing exceptions within 30 days.[321] The agency's seven ALJs disposed of 110 cases in FY1978, with agency review in 96 cases, 83 of which resulted in affirmance of the ALJ's decision.

Federal Trade Commission: The twelve administrative law judges at the FTC preside over and render initial decisions in enforcement proceedings under the Federal Trade Commission Act and the Clayton Act.[322] The decision whether an unfair trade practice, false advertising, or a restraint of trade proscribed by those acts has been shown is reviewable by the Commission on its own motion or at a party's behest, through filing within 10 days of the ALJ's decision a notice of intent to appeal. In FY1978, 36 cases were handled by the agency. Initial decisions were rendered in 19 cases, and the FTC reviewed 21 ALJ decisions, affirming 15 and reversing or remanding 6.[323]

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[318] See ACUS STATISTICAL REPORT, supra note 1, at 238-39. Six more cases under Executive Order No. 11491 were decided in FY1978 by the U.S. Civil Service Commission, which prior to January 1, 1979 had jurisdiction of cases involving employees of the Department of Labor.

[319] 5 C.F.R. § 2423.29(a) (1983).

[320] See 5 U.S.C. § 7105(f) (Supp. IV 1980): ". . . the Authority may, upon application by any interested person . . . review such action. . . . If the Authority does not undertake to grant review . . . the action shall become the action of the authority. . . ." [emphasis added]

[321] See 46 C.F.R. § 502.227(1) (1982).

Food and Drug Administration: A separate bureau within the Department of Health and Human Services,[324] the FDA passes on license applications for new drugs having use for humans or animals. Hearings are held before the Administration's ALJ, whose initial decision is reviewable by the Commissioner on his own motion or on exception of the parties. There was only one such decision issued in FY1978, and it was reviewed and remanded by the Commissioner.[325] The ALJ also presides over formal rulemaking proceedings and issues initial decisions reviewable as of right by the Commissioner. One rulemaking decision was issued in FY1978.

Department of Labor: Among agencies employing ALJs, the Department of Labor ranks third in number of ALJs and fourth in number of cases adjudicated. Included in its caseload for FY1978 were twelve different proceedings under a variety of statutes. The disparate statutory mandates result in review mechanisms within the Department that fall under six different review categories as defined in this Part. In disputes with grantees under the Comprehensive Employment and Training Act, the ALJs' initial decisions are reviewed by the Secretary if a party files exceptions, or the Secretary decides to review on his own motion, within 45 days.[326] Seven cases were heard in FY1978, one of which was reviewed and affirmed.

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[322] A variety of other statutes are the basis for determination that particular conduct constitutes an unfair or deceptive trade or practice proscribed by § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976).

[323] ACUS STATISTICAL REPORT, supra note 1, at 160-163. See note 311, supra.

[324] See 5 C.F.R. § 737.71 (1983), and note 147, supra.

[325] ACUS STATISTICAL REPORT, supra note 1, at 166-69. In the years FY1976-1978, the ALJ issued three decisions in contested new drug application cases. The Commissioner reviewed these decisions and remanded in all three cases.

Maritime Administration: This bureau of the Department of Commerce[327] employs ALJs in hearings concerned with benefits (subsidies under the Merchant Marine Act) and with contract disputes. The ALJs' initial decisions are subject to review as of right by the Administration on timely filing of exceptions. Fourteen cases were decided in FY1978.[328] Review of six cases resulted in one affirmance, three reversals, one modification, and one remand.

National Labor Relations Board: In unfair labor practice cases, one of the agency's 115 ALJs will preside over a hearing and issue an initial decision. Exceptions are reviewed as of right. Nominally, this review is by the Board. In practice, one member is assigned each case and delegates review responsibility to a member of his staff. The staff member prepares a draft decision, and when the Board member is satisfied with the draft, it is circulated to the remainder of the Board for approval. More than 5,000 cases were decided in FY1978 using this decision and review process. Over 700 contested cases received Board review.

National Transportation Safety Board: Hearings are held before ALJs in connection with licensing of airmen under the Federal Aviation Act. Contests of license denials, modifications, suspension, or revocation were heard by ALJs in 242 cases in FY1978, while one and one-half times that number were terminated without hearing. In 93 cases, the Board reviewed decisions on its own or a party's motion, affirming the ALJ's disposition in 53 and reversing, modifying, or remanding in 40.

Securities and Exchange Commission: In proceedings to deny, postpone, suspend, or revoke the registration of a securities broker or dealer, the Commission must review the ALJ's initial decision if a petition for review is filed within 15 days and may review on its own motion within 30 days. Thirty-five such cases were heard in FY1978, and eight were reviewed by the Commission. The same review procedure holds for cases involving withdrawal of registration, suspension, or expulsion of a member of a national securities exchange or the suspension of trading on an exchange, although no such cases were heard in FY1978.

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[326] If he chooses, the Secretary in any case can limit the ALJ to issuance of a recommended decision. See 20 C.F.R. §8.48 (1982).

[327] See 5 C.F.R. § 737.71 (1983), and note 147, supra.

[328] The Administration can require issuance of a recommended decision and certification of the record for decision. See 46 C.F.R. §§ 201.158, 201.164 (1982).

U.S. Coast Guard: License revocation and suspension decisions by the agency's 16 ALJs were reviewed by the Commandant on his own motion or on timely filing of an appeal. At the appeal stage, the Chief Administrative Law Judge for the agency will draft a recommendation to the agency's Chief Counsel, whose recommendation is then forwarded to the Commandant. The Coast Guard is a separate agency within the Department of Transportation.[329] The Commandant's decisions are not appealable within the Department but may be appealed to the National Transportation Safety Board, an independent agency.

3. Discretionary Review

Civil Aeronautics Board: The 11 ALJs at the CAB render a variety of decisions encompassing regulation of domestic airline operations, including actions relating to routes, mergers, rates, and enforcement of CAB regulations or the Federal Aviation Act against suspected violators. In these actions, the ALJ renders an initial decision that, at the behest of a party, is subject to review in the Board's discretion. Petitions for review must demonstrate that: "(i) A finding of material fact is erroneous; (ii) A necessary legal conclusion is without governing precedent or is . . . contrary to law . . .; (iii) A substantial and important question of law, policy or discretion is involved; or (iv) A prejudicial procedural error has occurred."[330] In FY1978, 57 cases subject to these review procedures were closed; review was granted in 11 cases and denied in 9. Six of the decisions reviewed were affirmed.

Environmental Protection Agency: Among the proceedings before ALJs at the EPA are challenges to decisions respecting permits to discharge pollutants into navigable waters. The ALJ's initial decision is appealable to the Administrator who has discretion to grant or deny review.[331] Most permit cases are settled. Of 55 such cases in FY1978, only 6 proceeded to decision after hearing before an ALJ and in none was intra-agency review sought. As with the cases discussed under category 2 above, the Administrator may and often does assign these cases to a Judicial Officer for review but has not adopted a general delegation to that effect.[332]

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[329] See 5 C.F.R. § 737.71 (1983), and note 147, supra.

[330] 14 C.F.R. § 302.28(a)(2) (1982).

[331] 40 C.F.R. § 124.91 (1982).

[332] See 40 C.F.R. § 22.04(b) (1982), and authorities cited at notes 314 and 315, supra.

Federal Mine Safety and Health Review Commission: One of three independent federal adjudicative agencies (separate from the body promulgating substantive rules to which its cases relate), FMSHRC with 18 ALJs hears and decides enforcement actions brought by the Department of Labor's Mine Safety and Health Administration. In the first half-year of its existence (the last half of FY1978), FMSHRC decided nearly 1600 cases. Initial decisions of the ALJs are appealable to the Commission, which may review at its discretion. Fifteen cases were decided by the Commission in this period.

Department of Housing and Urban Development: HUD's administrative law judge issues initial decisions in a variety of enforcement proceedings. These decisions are reviewable at the discretion of the Secretary, who may decide against review, may review the decision, or may assign a subordinate to review the decision.[333] In FY1978, 68 cases were decided, and 14 were reviewed.

Merit Systems Protection Board: Disputes concerning federal employees' pay, termination, and retirement benefits, or concerning political activities of federal, state, or local governmental employees may be reviewed by the board on its own motion or in the Board's discretion if a timely petition for review is filed.[334] The MSPB was created by the Civil Service Reform Act of 1978,[335] and on January 1, 1979, assumed most of the caseload formerly handled by the U.S. Civil Service Commission, which expired as of that date. In FY1978, the Civil Service Commission decided only five cases in the categories now handled by MSPB.

Occupational Safety and Health Review Commission: This independent adjudicative agency (like FMSHRC, separate from the substantive rulemaking body) ranks fifth in ALJs employed and third in total ALJ caseload. OSHRC adjudicates enforcement actions initiated by the Occupational Safety and Health Administration of the Department of Labor for violation of the Occupational Safety and Health Act. Affected parties can contest OSHA citations and penalties before OSHRC. Initial decisions are reviewed by the Commission on its own motion or in its discretion on petition by a party. The grounds for grant of review are similar to those governing CAB review.[336] In FY1978, the ALJs at OSHRC decided nearly 4,000 cases and the Commission reviewed 160.

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[333] 24 C.F.R. § 24.8(b), (c) (1982); see also 24 C.F.R §§ 25.4, 3282.152 (1982). Land registration cases follow a different review process.

[334] 5 C.F.R. § 1201.113(a) (1983).

[335] Pub. L. No. 454, 95th Cong., 2d Sess., Oct. 31, 1978, 92 Stat. 1119. Relevant sections are codified at 5 U.S.C. § 1201 et seq. (Supp. IV 1980).

Securities and Exchange Commission: In proceedings evaluating applications to exempt securities from provisions of the Securities Act of 1933, of the Public Utility Holding Company Act of 1935, or of the Investment Company Act of 1940, or to suspend or revoke an investment adviser's registration under the 1940 Act, ALJs' initial decisions are reviewable in the Commission's discretion on a showing of prejudicial procedural error, clearly erroneous material factual finding, an erroneous legal conclusion, or special decisional importance meriting Commission attention.[337] In FY1978, there were 15 such cases before the SEC; seven initial decisions were filed by ALJs, and the Commission reviewed nine cases,[338] affirming in all nine.

B. Review by Appeals Board

8. Board Review of Right, Discretionary Agency Review.

Federal Communication Commission: The FCC's review process is described in greater detail in Part III, supra. It has several interesting features. The ALJ decisions are reviewed by a three-member appellate review board. Review is a matter of right. The Commission may decide without opinion to deny review, or it may on request of a party or on its own motion grant review of Board decisions. When the Commission decides to review, another body, the Office of Opinions and Review, provides the Commissioners assistance in formulating and drafting a decision. This process is applied to a great variety of different determinations, covering routine licensing decisions, multiparty contests for extremely valuable licenses, enforcement actions, ratemaking proceedings, and reparations determinations that resemble private lawsuits. In FY1978, the ALJs at the FCC issued 78 initial decisions; 24 were passed upon by the Review Board, which affirmed 17 decisions; 15 cases were subsequently decided by the Commission. Additionally, the Commission directly reviewed ALJ decisions respecting revocation or renewal of broadcast licenses. These cases recently have been placed under Review Board jurisdiction.

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[336] 29 C.F.R. §§ 2200.91, 2200.92 (1982); see text at note 330, supra.

[337] 17 C.F.R. § 201.17(d)(2) (1982).

[338] See ACUS STATISTICAL REPORT, supra note 1, at 300-13; see also note 311, supra.

Interstate Commerce Commission: Like the FCC, the ICC handles an array of cases that differ in the nature of the interests at stake, the complexity of the issues, and the method in which the cases arise. Licensing decisions, adjudication of complaints, rate investigations, scrutiny of individual enterprises' practices and of agreements among regulated enterprises are included in the ICC's docket. While the FCC employs somewhat more ALJs than the median among federal agencies employing ALJs and has a caseload very slightly above the median, in both departments the ICC is near the top among agencies employing ALJs, ranking fourth in number of ALJs and fifth in number of cases.[338a] The general pattern is for more complex cases to be heard before an ALJ who issues an initial decision that may be reviewed by a division of the ICC (each consisting of three Commission members) on the Commission's motion or as of right on timely exception by a party. The division's decision then is reviewable by the Commission at its discretion if it determines that "a matter of general transportation importance" is involved. This basic review pattern is in reality further complicated by three factors. First, in some instances the ALJ's decision is reviewed by an employee review board rather than a division composed of Commission members. Second, although review at the board or division level is a matter of right, the scope of review is delimited in a manner similar to that guiding discretionary review in other agencies.[339] Third, as noted earlier, in some intances the Commission may dispense with the requirement of an initial decision, in which case the ALJ will draft a recommended decision for Commission action. Eliminating cases that appear to have been removed from the initial decision-and-division or board review process, the ICC disposed of more than 1,000 cases in FY1978 of which about one-fourth proceeded to the review stage.

Nuclear Regulatory Commission: Licensing proceedings before the Commission's ALJs result in issuance of an initial decision that is reviewable as a matter of right by the Atomic Safety and

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[338a] The ICC's complement of ALJ's and relevant adjudicatory caseload both have declined considerably since the data relied on here were compiled. See Letter to Richard K. Berg from Reese H. Taylor, Jr., Chairman, ICC, July 20, 1983.

[339] See, e.g., 49 C.F.R. § 1100.98(b)(2) (1982). Compare id. with 14 C.F.R. § 302.28(a)(2) (1982) (CAB); 17 C.F.R. § 201.17(d)(2) (1982) (SEC); 29 C.F.R. § 2200.92 (1982) (OSHRC).

Licensing Appeal Board. The Board's decision is reviewable at the Commissioners' discretion and the grounds for review are limited in much the same manner as at the CAB, OSHRC, and the SEC.[340] Four cases were reviewed and affirmed by the Board.

11. Board Review of Right, No Agency Review

Department of Interior: A variety of cases involving permits to use public lands, conflicting claims to mineral rights, penalties for violation of the Endangered Species Act or of restrictions on land use make up the docket for Interior's 13 ALJs.[341] Appeals from ALJ's initial decisions, except for cases noted below in categories 12 and 20, are taken by right to one of four different appeals boards[342] (Board of Land Appeals, Board of Surface Mining Appeals, Board of Indian Appeals, and Teton Ad Hoc Appeals Board). These boards constitute the final review stage within the agency. More than 1,100 cases were decided in FY1978, and action by an appeals board was taken in more than 800 cases.

Department of Labor: Compensation claims pursuant to the Longshoremen's and Harbor Worker's Compensation Act and the Black Lung Benefit Reform Act are heard by ALJs at the Department of Labor. The ALJs' initial decisions are appealable within 30 days by right to the Department's Benefits Review Board, which provides the final agency review. More than 1,800 such claims were processed in FY1978. Approximately 1,000 initial decisions were issued, and nearly 300 cases were reviewed by the Benefits Review Board. Of these, more than 80 initial decisions were affirmed, 14 were reversed, and the remainder were modified or remanded.

Department of Commerce, Maritime Administration: The operation of this bureau of the Commerce Department has been described above in category 2. The regulations governing review of disputes other than contract appeals declare that review is to be by "the Administration."[343] A reading of the Administration's organization chart indicates that the reference most likely is to the Maritime Subsidy Board, which is chaired by the Maritime Administrator, who also is the Assitant Secretary of

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[340] 10 C.F.R. § 2.786 (1982); see provisions of other agencies cited at note 339, supra.

[341] See, e.g., 16 U.S.C. §§ 668(b) (1976); 30 U.S.C. §§ 22, 29 (1976); 43 U.S.C. §§ 315, 1201 (1976).

[342] See 43 C.F.R. §§ 4.1, 4.320, 4.452-9, 4.476, 4.1270 (1982); see also note 245, supra.

[343] See 45 Fed. Reg. 80, 857 (Dec. 8, 1980).

Commerce for Maritime Affairs.[344] If the Administration is treated as a part of the Commerce Department, rather than an independent bureau, it would properly belong in this category.

12. Discretionary Board Review, No Agency Review

Department of Housing and Urban Development: In cases under the Interstate Land Sales Full Disclosure Act to assess the validity of HUD suspension of the registration of a land developer, the ALJ's initial decision is reviewable at the discretion of the appeals officer of the Interstate Land Sales Board on petition for appeal filed within 10 days. If the Appeals Officer denies review, there is no further action within the agency. If he grants the petition, review is before the Interstate Land Sales Appeals Board, which has been delegated full decisional authority by the Secretary. Of the 85 cases in FY1978, only five proceeded to the initial decision stage, and all five were reviewed and remanded by the Board.

Department of Interior: In civil penalty cases under the Surface Mining Control Act of 1977, the ALJs' decisions are appealable to the Board of Surface Mining Appeals. Review is discretionary with the Board, and Department regulations do not elaborate the grounds for granting or denying review, although petitioners are asked to "list the alleged errors of the administrative law judge."[345] This class of cases was new in FY1978, and although 16 were docketed, no decisions were issued.

Department of Labor: Disputes over the prevailing industry wage in an area for a given class of workers, which rate must under the Davis-Bacon Act be paid by government contractors, sometimes are heard by ALJs.[346] In such cases, the ALJ proposed a decision to the Administrator for the Wage and Hour Division, who considers exceptions and issues a decision. Appeal from this decision may be taken to the Wage Appeals Board, which has discretion to grant or deny review and constitutes the final forum for agency consideration. Five decisions were rendered in these cases in FY1978, and none was reviewed. Because of the interpostion of the Administrator between the ALJ and the Appeals Board, this procedure is also catalogued under category 16 below.

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[344] See 45 Fed. Reg. 80,857 (Dec. 8, 1980).

[345] 43 C.F.R. § 4.1270(c) (1982).

[346] Some related matters also may be heard by the Wage Appeals Board. See 29 C.F.R. § 7.1(b) (1982).

Social Security Administration: Benefits claims under the Social Security Act are adjudicated by ALJs at the Social Security Administration, an independent agency within the Department of Health and Human Services.[347] SSA has by far the most ALJs (nearly 700 in June 1980) and the heaviest ajudicatory caseload (over 200,000 cases in FY1978) of any federal agency. ALJ decisions are reviewed by the Appeals Council, which has discretion to deny review (on much the same grounds that, where they are spelled out, guide the exercise of discretion in other agencies)[348] or to review on its own motion. The Appeals Council decision is the final agency determination. Nearly 50,000 cases were ruled upon by the Council, which declined review in more than 95 percent of the cases. Of the decisions reviewed, more than four times as many were reversed as were affirmed (439 affirmances verus 1,859 reversals), indicating that the Council's screening of cases may resemble review in every case, with those likely to be reversed being formally reviewed.

C. Review by Individual Designate

13. Recommended Decision, Agency Review of Right

Bureau of Alcohol, Tobacco, and Firearms: Contests over applications for permits to import, sell, use, or distill alcohol or to import, manufacture, or deal in explosives, firearms, or ammunition are heard before an ALJ. The ALJ issues a recommended decision which then is acted upon by the Regional Regulatory Administrator. The Administrator's decision may be challenged directly in court or may first be appealed to the Director of the Bureau as a matter of right. Figures for FY1978 do not distinguish between these cases and those involving permit revocations, where, as discussed in category 2, the ALJ issues an initial decision that is appealable of right to the Director.

14. Designate Review of Right, Agency Review of Right

U.S. Coast Guard - National Transportation Safety Board: Moreover, the only "agency" that might fit into this category is a poor fit at best. As noted in category 2 above, the Coast Guard is an agency within the Department of Transportation, while NTSB is an agency independent of the Department. Review of ALJ licensing decisions is by the Commandant of the Coast Guard as a matter of right. His decisions are appealable to NTSB as a matter of right. Were these two bureaus viewed as, respectively, subordinate and superior elements of one agency, the review process would be a two-stage, review-of-right process.

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[347] See 5 C.F.R. § 737.31 (1983), and note 147, supra.

[348] 20 C.F.R. § 404.970(a) (1982); see provisions of other agencies cited at note 339, supra.

15. Discretionary Review by Designate, Further Review of Right

Department of Labor: In enforcement proceedings under the Walsh-Healy Public Contracts Act of 1936, the ALJs' decisions are reviewable by the Administrator of Workplace Standards who has discretion to grant or deny review. If the Administrator's action, in denying review or after reviewing the ALJ's decision, results in a determination that the Act has been violated, the Administrator recommends a sanction to the Secretary of Labor. The contractor has 20 days to apply to the Secretary for relief from the Act's sanction of ineligibility for future government contracts. Only one initial decision in such a case was rendered in FY1978, and that decision was not reviewed.

16. Recommended Decision, Disciplinary Further Review

Department of Labor: As described earlier in discussing category 12, in disputes under the Davis-Bacon Act, ALJs issue recommended decisions that are acted on by the Administrator of the Wage and Hour Division. Subsequent review is at the discretion of the Wage Appeals Board.

19. Recommended Decision, No Agency Review

Department of Justice, Drug Enforcement Administration: As discussed in category 1, DEA is a separate statutory agency within the Department of Justice.[349] If viewed as a component of that department rather than as a self-contained agency, the Administrator's final review of the ALJ's recommended decisions would be as designate of the Attorney General.

20. Designate Review of Right, No Agency Review

Department of Agriculture: The five ALJs at the Department of Agriculture hear and issue decisions in a variety of licensing and enforcment proceedings under no fewer than seventeen different statutes.[350] In most proceedings, the ALJs issue initial decisions appealable of right to a judicial officer designated by the Secretary of Agriculture. In these cases, the judicial officer has been delegated authority as the final arbiter of adjudicatory proceedings within the Department.[351] Over 200 cases were disposed of in FY1978, although initial decisions were issued in less than half that number. Approximately 20 decisions were reviewed and only 2 reversed.

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[349] See 5 C.F.R. § 737.31 (1983), and note 147, supra.

[350] See authorities cited at notes 280-283, supra; see also ACUS STATISTICAL REPORT, supra note 1, at 34-61.

Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms: The Bureau's adjudication and review processes are described above under category 2. If viewed not as an independent statutory agency, but instead as a part of the Treasury, the Director's review function would be that of a designate, reviewing ALJ decisions as a matter of right, and providing final agency review.

Environmental Protection Agency: In cases concerning enforcement of the Clean Air Act and the Federal Insecticide, Fungicide, and Rodenticide Act by civil penalty, the decisions of the ALJs are appealable as of right to the appropriate EPA Regional Administrator.[351a] The Regional Administrator's decision, which also may be on his own motion, is final. In FY1978, 90 cases in these categories were terminated by EPA; in 27, initial decisions were issued, but review data were not available. Also see discussion of the Agency's use of Judicial Officers in categories 2 and 3 above.

Department of Health and Human Services, Food and Drug Administration: Like the Bureau of Alcohol, Tobacco, and Firearms, treatment as part of its "umbrella" executive department would move FDA cases from category 2 to category 20.

Department of Interior: As described in category 11 and category 12, most ALJ decisions are reviewed by one of the Department's four appeals boards. Cases not within the jurisdiction of one of these appeals boards may be appealed as of right to the Office of Hearings and Appeals. In such cases the Director of the Office will review the decision. That review will be the final agency action.

Department of Labor: In enforcement actions under the Service Contracts Act involving service employees of federal contractors, upon timely petition by a party the ALJs' initial decisions will be reviewed by the Administrator of the Wage and Hour Division. His decision is the final step within the department. With respect to factual matters, his scope of review is limited to reversing clear errors.[352]

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[351] See text at notes 258-308 supra.

[351a] This procedure was changed in April 1980, so that appeals are now taken to the Administrator or his designee. 40 C.F.R. § 22.29 (1983).

[352] 29 C.F.R. § 6.14 (1982).

U.S. Postal Service: The two ALJs at the Postal Service decide cases involving alleged use of the mail for material making false representations or of matter deemed nonmailable by a postmaster; they also adjudicate Postal Service denials of post office box privileges. After the ALJ decision, appeal may be taken to the agency's judicial officer, who has been delegated review authority by the Postmaster General.[353] There were 100 cases closed during FY1978, with 24 initial decisions issued. Review of 25 decisions[354] resulted in two remands and 23 affirmances.

21. Discretionary Review by Designate, No Agency Review

The Department of Housing and Urban Development uses this process for review of cases involving suspension of a land developer's registration. The discretionary review, performed by the appeals officer of the Interstate Land Sales Board, however, is only to decide whether an appeal should be allowed. If allowed, the appeal is heard and decided by the Board, not by the appeals officer. The process is discussed more fully under category 12.

D. No Review

22. Final ALJ Action

The Department of Labor's disposition of civil penalty cases involving use of child labor in contravention of the Fair Labor Standards Act is discussed in the text of Part III, *supra*. The ALJs' decisions in such matters are the final agency action. There were 29 civil penalty cases in FY1978, with decisions issued in 24 of them.

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[353] The pattern of review is complicated somewhat because the judicial officer may refer some cases to the Postmaster General or Deputy Postmaster General for final decision, *see* 39 C.F.R. §§ 953.6, 958.10 (1982), and may preside over other cases in the first instance in place of an ALJ, 39 C.F.R. § 952.24(b) (1982).

[354] *See* note 31 *supra*.

FIRST-STAGE REVIEWED & SECOND STAGE REVIEW ALJ DECISION AND FIRST STAGE REVIEW	REVIEW BY AGENCY HEAD	APPEALS BOARD: AGENCY REVIEW OF RIGHT	APPEALS BOARD: DISCRETIONARY AGENCY REVIEW	APPEALS BOARD: NO FURTHER REVIEW	DESIGNATE: AGENCY REVIEW OF RIGHT	DESIGNATE: DISCRETIONARY AGENCY REVIEW	DESIGNATE: NO FURTHER REVIEW	NO REVIEW
RECOMMENDED DECISION	1. CAB* DEA ICC* MSPB* USITC	4.	7.	10.	13. BATF*	16. Labor**	19. (DEA)	
INITIAL DECISION REVIEWED OF RIGHT	2. BATF* CFTC CPSC EPA*+ FERC FLRA FMC FTC FDA Labor* Maritime NLRB NTSB SEC* U.S. Coast Guard	5.	8. FCC ICC* NRC	11. Interior* Labor* (Maritime)	14. (NTSB-U.S. Coast Guard)	17.	20. Agriculture (BATF) EPA* (FDA) Interior* Labor* USPS	
DISCRETIONARY REVIEW OF INITIAL DECISION	3. CAB* EPA*+ FMSHRC HUD* MSPB* OSHRC SEC*	6.	9.	12. HUD** Interior* Labor** SSA	15. Labor*	18.	21. HUD **	
NO REVIEW								22. Labor*

* - less than all of the agency's cases involve this review process
** - this class of cases is described in more than one category
( )- inclusion in this category depends on definition of agency
+ - see qualification in text

APPENDIX 2 TO PART III

REVIEW AND DECISION DATA

APPENDIX 2 to PART III

REVIEW AND DECISION DATA

1. By Agency
2. By Review Category
3. By Bureau Type
4. By Agency and Category

KEY

1. Name of Agency.
2. Program (if review process differs for different programs, or if time for review differs dramatically).
3. Review Category.
4. Rank in Number of ALJ's (Actual Number).
5. Rank in Number of Cases (Actual Number).
6. Rank in Number of Cases Completed (Actual Number)(i.e., not withdrawn or dismissed).
7. Rank in Number of Cases Reviewed (Actual Number).
8. Rank in Percent of Cases Reviewed (Percent).
9. Rank in Total Time (Time).
10. Rank in ALJ Time (Time).
11. Rank in Review Time (Time).
12. Rank in Number of Cases Reversed (Number).
13. Rank in Percent of Cases Reversed (Number).
14. Rank in ALJ Caseload (Number).

REVIEW CATEGORIES:

A. AGENCY HEAD
    1. Automatic Review
    2. Review of Right
    3. Discretionary Review
B. APPEALS BOARD
    8. Review of Right, Discretionary 2D Stage
    11. Review of Right, No 2D Stage
    12. Discretionary Review, No 2D Stage
C. DESIGNATE
    13. Automatic Review, 2D Stage of Right
    14. Review of Right, 2D Stage of Right (NTSB-USCG)
    15. Discretionary Review, 2D Stage of Right
    16. Automatic Review, 2D Stage Discretionary
    19. Automatic Review, No 2D Stage (DEA)
    20. Review of Right, No 2D Stage
    21. Discretionary Review, No 2D Stage
D. NO REVIEW
    22. No Reviews

1. DATA, BY AGENCY

BY AGENCY	3	4	5	6	7	8	9	10	11	12	13	14
U.S. Dept. of Agriculture	2,20	18(5)	8(705)	12(102)	14(55)	21 (7.8%)	13(677.5)	6(435.6)	14(180.7)	12(5)	7(9.1%)	7(47)
Bureau of Alcohol, Tobacco & Firearms	13,2 or 20	22(1)	13(286)	14(80)	16(47)	19(16.4%)	10(802.1)	21 (143.0)	16(145.7)	16(4)	9(8.5%)	4(95.3)
Civil Aeronautics Board	1, 3	12(11)	16(258)	9(222)	9(203)	5(78.7%)	8(1008.5)	9 (262.7)	12(271.8)	9(8)	18 (3.9%)	20(7.8)
Consumer Products Safety Commission	2	22(1)	21(30)	23(9)	22(9)	11(30%)	7(1128.2)	8 (271.7)	6(401.4)	18(1)	5(11%)	17(10)
Drug Enforcement Administration	1 or 19	22(1)	18(124)	19(44)	17(45)	9(36.2%)	22(309.4)	11 (244.0)	23(44.5)	17(2)	16(4.4%)	8(41.3)
Environmental Protection Agency	2 & 3	14(7)	12(381)	16(69)	23(8)	24(2.1%)	14(541.1)	13 (221.7)	21(76.1)	20 (0)	20 (0%)	12(18.1)
Federal Communications Commission (1976 Only)	8	9(13)	17(132)[1]	17(66)	18(38)	12(28.8%)	4(1384.9)	4 (479.4)	3(480.2)	11(6)[2]	4(15.8%)	16(10.2)
Federal Energy Regulatory Comm.	2	6(22)	10(567)	8(259)	7(248)	8(43.7%)	9(963.7)	5 (453.3)	9(306.7)	7(13)	13(5.2%)	18(8.6)
Federal Maritime Commission	2	14(7)	15(265)	11(152)	8(227)	3(85.7%)	15(539.1)	10 (260.2)	17 (140.6)	7(13)	11(5.7%)	14(12.6)
Federal Trade Commission	2	11(12)	19(121)	18(47)	13(56)	7(46.3%)	2(1741.0)	1 (720.3)	7(355.7)	12(5)	8(8.9%)	23(3.4)
Food and Drug Administration	2 or 20	22(1)	23(5)	24(4)	24(4)	4(80%)	1(1950.4)	19 (166.5)	1 (611.8)	20 (0)	20 (0%)	24(1.7)
Dept. of Housing & Urban Development	3,12 & 21	22(1)	9(638)	15(76)	11(123)	15(19.3%)	21(313.3)	20 (161.6)	22 (52.7)	20 (0)	20 (0%)	2(212.7)
Interstate Commerce Commission	1 & 8	4(55)	4(4594)	6(1522)	4(847)	16(18.4%)	12 (736.0)	18 (179.7)	10 (297.5)	2(256)	2(30.2%)	11(27.8)
Department of Labor	2,11,12, 16,20,22	3(66)	3(6172)	4(2925)	3(979)	20(15.9%)	11 (764.3)	15 (200.4)	13 (262.4)	4(38)	18 (3.9%)	10(31.2)

1-FCC would rank 12th in caseload computed on same 3-year basis as other agencies.
2-FCC would rank 7th in reversals computed on same 3-year basis as other agencies.

By Agency (page 2)	3	4	5	6	7	8	9	10	11	12	13	14
Maritime Administration	2 or 11	20 (3)	20(36)	22(17)	21(13)	10(36.1%)	6(1266.2)	2(656.8)	8(326.5)	12(5)	1(38.5%)	21(4)
NLRB	2	2(115)	5(3820)	3(3820)	2(2686)	6(70.3%)	20(386.8)	22(103.8)	18 (123.5)	3 (125)	14(4.7%)	15(11.1)
National Transportation Board	2 & 14	16(6)	6(1991)	7(848)	6(352)	18(17.7%)	19(389.2)	17 (185.4)	15 (152.6)	5(23)	10(6.5%)	3(110.6)
Nuclear Regulatory Commission	8	22(1)	21(30)	20(28)	19(28)	2(93.3%)	3(1482.2)	7 (375.7)	2 (526.7)	20(0)	20 (0%)	17 (10)
Occupational Safety & Health Rev. Comm. (1977-1978)	3	5(48)	2(7642)	2(6762)	5(423)	23(5.5%)	N/A	12(222.5)	4(422)	N/A	N/A	6(79.6)
Securities & Exchange Comm.	2&3	14(7)	14(275)	13(87)	15(49)	17(17.8%)	5 (1352.5)	3(484)	5(409.1)	12(5)	6(10.2%)	13(13.1)
Social Security	12	1(698)	1(631, 626)	1 (631,626)	1(166, 312)	13(26.3%)	23 (249.2)	23 (99.8)	24 (40.8)	1 (7276)	16 (4.4%)	1(301.6)
U.S. Coast Guard	2	8(16)	7(1937)	5(1672)	12(114)	22(5.9%)	18 (391, 8)	24(60.2)	11 (287.1)	6(21)	3 (18.4%)	9(40.4)
U.S. International Trade Comm.	1	21(2)	22(22)	21(22)	20(22)	1(100%)	17 (447.8)	15 (203.5)	20(76.7)	18(1)	15(4.5%)	22(3.7)
U.S. Postal Service	20	21(2)	11(566)	10(195)	10(125)	14(22.1%)	16 (453.8)	14 (209.9)	19(102.3)	10(7)	12(5.6%)	5(94.3)
TOTALS		(1101)	(662,223)	(650,654)	(173,013)	(26.1%)	(262.2)	(101.7)	(47.7)	(7814)	(4.5%)	(200.5)
W/O S.S.A.		(403)	(30,597)	(19,028)	(6701)	(21.9%)	(625.4)	(165.2)	(250.6)	(538)	(8.0%)	(76.6)
SSA/TOTAL		(64%)	(95%)	(97.1%)	(96.1%)					(93.1%)		

2. DATA, BY REVIEW CATEGORY

BY REVIEW CATEGORY

* Information Incomplete

Cat. #	5	6	7	8	9	10	11	12	13
1	8 (239)	7 (152)	7 (149)	1 (62.3%)	7 (390.9)	9 (180.2)	6 (149.6)	8 (3)	7 (2.0%)
2	2 (9333)	3 (6964)	2 (3764)	2 (40.3%)	6 (480.6)	11 (125.7)	4 (152.0)	2 (212)	4 (5.6%)
3	3 (8164)	2(6988)	4 (645)	10(7.9%)	4 (625.6)*	4 (225.2)	2 (345.6)	6 (8)*	8 (1.3%)*
8*	9 (162)	8 (94)	8 (66)	3 (40.1%)	1 (1402.9)	1 (448.5)	1 (499.9)	7 (6)	1 (9.1%)
11*	4 (5282)	4 (2448)	3 (659)	8 (12.5%)	2 (818.1)	5 (203.4)	3 (318.7)	3 (39)	3 (5.9%)
12	1 (632,052)	1 (631,655)	1 (166,241)	5 (26.3%)	12 (249.3)	12 (99.8)	11 (40.8)	1 (7276)	6 (4.4%)
13	UNABLE TO DISTINGUISH BETWEEN CASE TYPES								
14	5 (1991)	5 (848)	5 (352)	6 (17.7%)	8 (389.2)	8 (185.4)	4 (152.6)	4 (23)	2 (6.5%)
15	NO SIGNIFICANT CASELOAD								
16	12 (37)	10 (30)	11 (4)	9 (10.8%)	3 (689.5)	6 (198.7)	8 (125.2)	10 (0)	9 (0%)
19	10 (124)	9 (44)	9 (45)	4 (36.2%)	10 (309.4)	3 (244.0)	10 (44.5)	9 (2)	6 (4.4%)
20	6 (1443)	6 (399)	6 (200)	7 (13.9%)	5 (617.3)	2 (267.4)	7 (141.1)	5 (11)	5 (5.5%)
21	7 (421)	12 (24)	10 (29)	11 (6.9%)	9 (350.1)	10 (160.8)	9 (91.0)	10 (0)	9 (0%)
22	11 (101)	11 (25)	(--)	(--)	11 (305.4)	7 (187.4)	(--)	(--)	(--)

REVIEW CATEGORY #1

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Civil Aeronautics Board--FAA Foreign Permits	(93)	(86)	(82)	(88.1%)	(486.2)	(141.6)	(226.8)	(0)	(0%)
Drug Enforcement Administration	(124)	(44)	(45)	(36.2%)	(309.4)	(244.0)	(44.5)	(2)	(4.4%)
Interstate Commerce Commission (incomplete data)	UNABLE TO DISTINGUISH BETWEEN CASE TYPES								
United States Int'l Trade Commission	(22)	(22)	(22)	(100%)	(447.8)	(203.5)	(76.7)	(1)	(4.5%)
TOTALS FOR CATEGORY #1	(239)	(152)	(149)	(62.3%)	(390.9)	(180.2)	(149.6)	(3)	(2.0%)

REVIEW CATEGORY #2

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Totals for U.S. Dept. of Agriculture	(26)	(13)	(13)	(50%)	(551.6)	(490.4)	(145.8)	(1)	(7.7%)
Bureau of Alcohol, Tobacco &Firearms	(30)	(7)	(4)	(13.3%)	(828.0)	(157.9)	(161.5)	(0)	(0%)
Consumer Products Safety Commission	(30)	(9)	(9)	(30%)	(1128.2)	(271.7)	(401.4)	(1)	(11%)
Environmental Protection Agency	(297)	(61)	(8)	(2.7%)	(541.1)	(201.2)	(76.1)	(0)	(0%)
Federal Energy Regulatory Comm.	(567)	(259)	(248)	(43.7%)	(963.7)	(453.3)	(306.1)	(13)	(5.2%)
Federal Maritime Commission	(265)	(52)	(227)	(85.7%)	(539.1)	(260.2)	(140.6)	(13)	(5.7%)
Federal Trade Commission	(121)	(47)	(56)	(46.3%)	(1741.0)	(720.3)	(355.7)	(5)	(8.9%)
Food and Drug Administration	(5)	(4)	(4)	(80%)	(1950.4)	(166.5)	(611.8)	(0)	(0%)
Department of Labor (CETA)	(20)	(10)	(1)	(5%)	(179.5)	(143.7)	(223.0)	(0)	(0%)
Maritime Administration (For. Trade Sub)	(5)	(5)	(--)	(--)	(251.6)	(153.0)	(--)	(--)	(--)
National Labor Relations Board	(3820)	(3820)	(2686)	(70.3%)	(386.8)	(103.8)	(123.5)	(125)	(4.7%)
National Transportation Safety Board	(1991)	(848)	(352)	(17.7%)	(389.2)	(185.4)	(152.6)	(23)	(6.5%)
Securities & Exchange Commission	(219)	(57)	(42)	(19.2%)	(1415.1)	(543.5)	(383.0)	(5)	(11.9%)
United States Coast Guard	(1937)	(1672)	(114)	(5.9%)	(391.8)	(60.2)	(287.1)	(21)	(18.4%)
TOTALS FOR CATEGORY #2	(9333)	(6964)	(3764)	(40.3%)	(477.4)	(125.7)	(152.0)	(212)	(5.6%)

REVIEW CATEGORY #3

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Civil Aeronautics Board	(165)	(136)	(121)	(73.3%)	(966.7)	(339.2)	(302.4)	(8)	(6.6%)
Environ. Prot. Agy. --Pollution Permits	(84)	(8)	(N/A)	(N/A)	(N/A)	(471.3)	(N/A)	(N/A)	(N/A)
Dept. of Housing & Urban Development	(217)	(52)	(94)	(43.3%)	(241.8)	(162.0)	(37.6)	(0)	(0%)
Occupational Safety & Health Rev. Comm. (77-78)	(7642)	(6762)	(423)	(5.5%)	(N/A)	(222.5)	(422)	(N/A)	(N/A)
Securities and Exchange Commission	(56)	(30)	(7)	(12.5%)	(1107.6)	(371.3)	(565.7)	(0)	(0%)
TOTALS FOR CATEGORY #3	(8164)	(6988)	(645)	(7.9%)	(625.6)	(225.2)	(45.6)	(8)	(1.3%)

NO AGENCIES FIT INTO CATEGORIES 4, 5, 6 OR 7

REVIEW CATEGORY #8

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Federal Communications Commission (1976 only)	(132)	(66)	(38)	(28.8%)	(1384.9)	(479.4)	(480.2)	(6)	(15.8%)
Interstate Commerce Commission	UNABLE TO DISTINGUISH BETWEEN CASE TYPES								
Nuclear Regulatory Commission	(30)	(28)	(28)	(93.3%)	(1482.2)	(375.7)	(526.7)	(0)	(0%)
TOTALS FOR CATEGORY #8	(162)	(94)	(66)	(40.1%)	(1402.9)	(448.5)	(499.9)	(6)	(9.1%)

NO AGENCIES FIT INTO CATEGORIES 9 OR 10

REVIEW CATEGORY #11

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Department of Interior		INSUFFICIENT DATA							
Department of Labor	(5251)	(2436)	(646)	(12.3%)	(805.8)	(200.1)	(318.5)	(34)	(5.3%)
Maritime Administration	(31)	(12)	(13)	(42.9%)	(1429.8)	(866.7)	(326.5)	(5)	(38.5%)
TOTALS FOR CATEGORY #11	(5282)	(2448)	(659)	(12.5%)	(818.1)	(203.4)	(318.7)	(39)	(5.9%)

REVIEW CATEGORY #12

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
HUD-Interstate Land Sales Full Disclosure Act--Chall. to Reg.St.	(421)	(24)	(29)	(6.9%)	(350.1)	(160.8)	(91.0)	(0)	(0%)
Dept. of Labor -- Public Contacts	(5)	(5)	(0)	(0%)	(616.0)	(255.4)	(--)	(--)	(--)
Social Security Administration	(631,626)	(--)	(166,212)	(26.3%)	(249.2)	(99.8)	(40.8)	(7276)	(4.4%)
TOTALS FOR CATEGORY #12	(632,052)	(631,655)	(166,241)	(26.3%)	(249.3)	(99.8)	(40.8)	(7276)	(4.4%)
W/O SSA	(426)	(29)	(29)	(6.8%)	(353.2)	(177.1)	(91.0)	(0%)	(0%)

REVIEW CATEGORY # 13

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Bureau of Alcohol, Tobacco & Firearms	UNABLE TO DISTINGUISH BETWEEN CASE TYPES								
TOTALS FOR CATEGORY #13									

REVIEW CATEGORY #14

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
National Transportation Safety Board	(1991)	(848)	(352)	(17.7%)	(389.2)	(185.4)	(152.6)	(23)	(6.5%)
TOTALS FOR CATEGORY #14	(1991)	(848)	(352)	(17.7%)	(389.2)	(185.4)	(152.6)	(23)	(6.5%)

SEE TEXT OF PART IV FOR DISCUSSION OF CATEGORY #15.

REVIEW CATEGORY #16

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Department of Labor--Wage Disputes	(32)	(25)	(4)	(12.5%)	(701.0)	(187.4)	(125.2)	(0)	(0%)
Public Contracts	(5)	(5)	(0)	(0%)	(616.0)	(255.4)	(--)	(--)	(--)
TOTALS FOR CATEGORY #16	(37)	(30)	(4)	(10.8%)	(689.5)	(198.7)	(125.2)	(0)	(0%)

THERE ARE NO AGENCIES IN CATEGORIES #17 & #18

REVIEW CATEGORY #19

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Drug Enforcement Administration	(124)	(44)	(45)	(36.2%)	(309.4)	(244.6)	(44.5)	(2)	(4.4%)
TOTAL FOR CATEGORY #19	(124)	(44)	(45)	(36.2%)	(309.4)	(244.6)	(44.5)	(2)	(4.4%)

REVIEW CATEGORY #20

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Dept. of Agriculture	(679)	(89)	(42)	(6.2%)	(682.3)	(427.6)	(191.5)	(4)	(9.5%)
Bureau of Alcohol, Tobacco & Firearms	(30)	(7)	(4)	(13.3%)	(828.0)	(157.9)	(161.5)	(0)	(0%)
Dept. of Labor--Service Contracts & Contract Compliance Enforcement	(168)	(108)	(29)	(17.3%)	(867.7)	(236.2)	(232.6)	(0)	(0%)
U.S. Postal Service	(566)	(195)	(125)	(22.1%)	(453.8)	(209.9)	(102.3)	(7)	(5.6%)
TOTAL FOR CATEGORY #20	(1443)	(399)	(200)	(13.9%)	(617.3)	(264.7)	(141.1)	(11)	(5.5%)

REVIEW CATEGORY #21

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
HUD--Interstate Land Sales Full Disclosure Act--Challenges to Reg. Statements	(421)	(24)	(29)	(6.9%)	(350.1)	(160.8)	(91.0)	(0)	(0%)
TOTAL FOR CATEGORY #21	(421)	(24)	(29)	(6.9%)	(350.1)	(160.8)	(91.0)	(0)	(0%)

REVIEW CATEGORY #22

AGENCY & PROGRAM TYPE	5	6	7	8	9	10	11	12	13
Dept. of Labor--Trade Certification/Child Labor Disputes	(101)	(25)	(--)	(--)	(305.4)	(187.4)	(--)	(--)	(--)
TOTALS FOR CATEGORY #22	(101)	(25)	(--)	(--)	(305.4)	(187.4)	(--)	(--)	(--)

3. DATA, BY BUREAU TYPE

1. EXECUTIVE DEPARTMENTS

DEPARTMENT	3	4	5	6	7	8	9	10	11	12	13	14
Agriculture	2, 20	18(5)	8(705)	12 (102)	14 (55)	21 (7.8%)	13 (677.5)	6 (435.6)	14 (180.7)	12 (5)	7(9.1%)	7(47)
HUD	3,12 &21	22 (1)	9(638)	15 (76)	11 (123)	15 (19.3%)	21 (313.3)	20 (161.6)	22 (52.7)	20 (0)	20 (0)	2(212.7)
Interior	L A C K O F I N F O R M A T I O N											
Labor	2, 11, 12, 16,20,22	3(66)	3(6172)	4(2925)	3(979)	20(15.9%)	11 (764.3)	15 (200.4)	13 (262.4)	4(38)	18 (3.9%)	10(31.2)
Postal Service	(20)	2 (2)	11 (566)	10 (195)	10 (125)	14 (22.1%)	16 (453.8)	14 (209.9)	19 (102.3)	10 (7)	12 (5.6%)	5(94.3)
TOTALS		(74)	(8081)	(3298)	(1282)	(15.9%)	(699.4)	(207.3)	(223.2)	(50)	(3.9%)	36.4

II. BUREAUS OF EXECUTIVE DEPARTMENTS

BUREAU/DEPARTMENT	3	4	5	6	7	8	9	10	11	12	13	14
Bureau of Alcohol, Tobacco & Firearms (Treasury Dept.)	13,2or20	22(1)	13(286)	14 (80)	16(47)	19(16.4%)	10(802.1)	21 (143.6)	16 (145.7)	16 (4)	9 (8.5%)	4(95.3)
Food & Drug Admin. (H.H.S.)	2 or 20	22(1)	23(5)	24 (4)	24 (4)	4 (80%)	1(1950.4)	19 (166.5)	1 (611.8)	20(0)	20(0%)	24(1.7)
Maritime Administration (Commerce Dept.)	2 or 11	20 (3)	20 (36)	22 (17)	21 (13)	10 (36.1%)	6(1266.2)	2 (656.8)	8 (326.5)	12 (5)	1(38.5%)	21(4)
Drug Enforcement Administration (Justice Dept.)	1 or 19	22 (1)	18(124)	19 (44)	17 (45)	9(36.2%)	22 (309.4)	11 (244.0)	23 (44.5)	17(2)	16(4.4%)	8(41.3)
Social Security Administration (H.H.S.)	12	1 (698)	1 (631,626)	(same)	1(166,212)	13 (26.3%)	23 (249.2)	23 (99.8)	24 (40.8)	1(7276)	16 (4.4%)	1(301.6)
US. Coast Guard (Transportation Dept.)	2	8 (16)	7 (1937)	5 (1672)	12 (114)	22 (5.9%)	18 (391.8)	24 (60.2)	11 (287.1)	6 (21)	3(18.4%)	9(40.4)
TOTALS		(720)	(634,014)	(633,443)	(166,435)	(26.2%)	(250.0)	(99.7)	(41.2)	(7308)	(4.4%)	(293.5)
TOTALS W/O SSA		(22)	(2388)	(1817)	(223)	(9.3%)	(461.6)	(44.6)	(339.3)	(32)	(14.3%)	(36.2)

III. INDEPENDENT REGULATORY AGENCIES

AGENCY	3	4	5	6	7	8	9	10	11	12	13	14
CAB	1, 3	12(11)	16(258)	9(222)	9(203)	5(78.7%)	8(1008.5)	9(262.7)	12 (271.8)	9 (8)	18 (3.9%)	20(7.8)
Consumer Products Safety Commission	2	(1/0)[1]	21(30)	23(9)	22(9)	11(30%)	7(1128.2)	8 (271.7)	6(401.4)	18(1)	5 (11%)	17(0)
EPA	2 & 3	14(7)	12(381)	16(69)	23(8)	24(2.1)%	14(541.1)	13(221.7)	21 (76.1)	20(0)	20 (0%)	12(18.1)
FCC *(1976 only)	8	9(13)	17(132)*	17(66)*	18(38)*	12(28.8%)*	4(1384.9)*	4 (479.4)*	3 (480.2)*	11(6)*	4 (15.8%)	16 (10.2)*
Federal Energy Regulatory Comm.	2	6(22)	10 (567)	8 (259)	7(248)	8 (43.7%)	9(963.7)	5 (453.3)	9 (306.7)	7 (13)	13 (5.2%)	19 (8.6)
Federal Maritime Commission	2	14 (7)	15 (265)	11 (152)	8(227)	3 (85.7%)	15 (539.1)	10 (260.2)	17 (140.6)	7 (13)	11 (5.7%)	14(12.6)
FTC	2	11 (12)	19 (121)	18(47)	13 (56)	7(46.3%)	2 (1741.0)	1 (720.3)	7 (355.7)	12 (5)	8(8.9%)	23 (3.4)
ICC	128	4(55)	4(4594)	6(1522)	4 (847)	16 (18.4%)	12 (736.0)	18 (179.7)	10 (297.5)	2(256)	2(30.%)	11(27.8)
NLRB	2	2(115)	5(3820)	3(3820)	2(2686)	6(70.3%)	20 (386.8)	22 (103.8)	18 (123.5)	3(125)	14 (4.7%)	15 (11.1)
National Trans. Safety Board	2 & 14	16 (6)	6 (1991)	7 (848)	6(352)	18 (17.7%)	19 (389.2)	17 (185.4)	15 (152.6)	5(23)	10 (6.5%)	3(110.6)
NRC	8	22 (1)	21(30)	20 (28)	19(28)	2(93.3%)	3 (1482.2)	7 (375.7)	2(526.7)	20 (0)	20 (0%)	17(10)
SEC	2 & 3	14 (7)	14 (275)	13 (87)	15 (49)	17(17.8%)	5(1352.5)	3(484)	5(409.1)	12 (5)	6 (10.2%)	13 (13.1)
U.S. Int'l. Trade Commission	1	21 (2)	22(22)	21(22)	20(22)	1(100%)	(447.8) 17	15 (203.5)	20(76.7)	18(1)	15 (4.5%)	22(3.7)
TOTALS		(259)	(12,486)	(7151)	(4873)	(39%)	(613.8)	(165.4)	(191.3)	(456)	(9.4%)	(16.4)

1-Temporarily Vacant

IV. SEPARATE ADJUDICATIVE AGENCY

	3	4	5	6	7	8	9	10	11	12	13	14
Federal Mine Safety & Health Review Commission	INSUFFICIENT DATA											
Occupational Safety and Health Review Commission	3	5(48)	2(7642)	6(6762)	5(423)	23 (5.5%)	N/A	12 (2225)	4(422)	N/A	N/A	6(79.6)
TOTALS		(48)	(7642)	(6762)	(423)	(5.5%)	N/A	(222.5)	(422)	N/A	N/A	(79.6)

4. DATA: BY AGENCY AND REVIEW CATEGORY

1 & 2	3	4	5	6	7	8	9	10	11	12	13
[1] U.S. DEPT. OF AGRICULTURE											
[2] Packers & Stockyards/Disciplinary Hearings	20		(421)	47	(27)	(6.4%)	(733.5)	(438.0)	(196.9)	(2)	(7.4%)
Perishable Commodities Disciplinary Hearings	20		(98)	14	(7)	(7.1%)	(743.7)	(377.1)	(230.4)	(1)	(14.3%)
Lab Animal Welfare Cases	20		(60)	9	(1)	(7.7%)	(421.0)	(473.9)	(169.0)	(0)	(0%)
Horse Protection Act	20		(42)	15	(5)	(11.9%)	(725.4)	(457.2)	(131.2)	(0)	(0%)
Grain Licensing	20		(7)	N/A	(0)	(0%)	(188.6)	N/A	(--)	(0)	(0%)
Veterinarian Accreditation	20		(1)	N/A	(0)	(0%)	(215.0)	N/A	(--)	(0)	(0%)
Inspection and Grading	20		(35)	4	(2)	(5.7%)	(532.5)	(266.5)	(144.5)	(1)	(50%)
Meat Inspection	20		(15)	(--)	(0)	(0%)	(381.8)	N/A	(--)	(0)	(0%)
TOTALS FOR THIS TYPE OF REVIEW			(679)	89	(42)	(6.2%)	(682.3)	(427.6)	(191.5)	(4)	(9.5%)

1 & 2	3	4	5	6	7	8	9	10	11	12	13
[1] U.S. DEPT. OF AGRICULTURE											
[2] Relief from Marketing Orders	2		(19)	13	(13)	(68.4%)	(696.5)	(490.4)	(145.8)	(1)	(7.7%)
Warehouse Licenses	2		(3)	N/A	(0)	(0%)	(94.7)	N/A	(--)	(0)	(0%)
Civil Rights Violations	2		(4)	N/A	(0)	(0%)	(206.3)	N/A	(--)	(0)	(0%)
TOTALS FOR THIS TYPE OF REVIEW	2		(26)	(13)	(13)	(50%)	(551.6)	(490.4)	(145.8)	(1)	(7.7%)
TOTALS FOR U.S.D.A.	2,20	18(5)	8(705)	12(102)	14(55)	21(7.8%)	(677.5)	(435.6)	(180.7)	(5)	(9.1%)
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS	2,13(20)	22(1)	13(286)	14(80)	16(47)	19(16.4%)	10 (802.1)	21 (143.0)	16 (145.7)	16(4)	9(8.5%)
[1] CIVIL AERONAUTICS BOARD											
[2]FAA Foreign Permits	1		(93)	(86)	(82)	(88.1%)	(486.2)	(141.6)	(226.8)	(0)	(0%)
[2] All Others	3		(165)	(136)	(121)	(73.3%)	(966.7)	(339.2)	(302.4)	(8)	(6.6%)
TOTALS FOR C.A.B.	1,3	12(11)	16(258)	9(222)	9(203)	5(78.7%)	8 (1008.5)	9 (262.7)	12 (271.8)	9(8)	18 (3.9%)
CONSUMER PRODUCTS SAFETY COMMISSION	2	22(1/0)	20(30)	23(9)	22(9)	11(30%)	7(1128.2)	8(271.7)	6(401.4)	18(1)	5(11%)

1 & 2	3	4	5	6	7	8	9	10	11	12	13
DRUG ENFORCEMENT ADMINISTRATION	1 or 19	22(1)	18(124)	19(44)	17(45)	9(36.2%)	22 (309.4)	11 (244.0)	23 (44.5)	17(2)	16(4.4%)
[1] ENVIRONMENTAL PROTECTION AGENCY											
[2] Pollution Permits	3		(84)	(8)	(0)	(0%)	--	(471.3)	--	--	(0%)
[2] Fed. Insecticide, Fungicide & Rodenticide Act--Civil Penalties & Reg. (1976 only)	2		(241)	(36)	(8)	(3.3%)	(541.1)	(211.7)	(76.1)	(0)	(0%)
[2] Other Cases	2		(56)	(25)	(0)	(0%)	--	(156.2)	--	--	(0%)
EPA TOTALS	2 & 3	14(7)	12(381)	16(69)	23(8)	24(2.1%)	14 (541.1)	13(221.7)	21 (76.1)	20 (0)	20 (0%)
FEDERAL COMMUNICATIONS COMMISSION *(1976 Data Only)	8	9(13)	17 (132)*	17 (66)*	18(38)*	13(28.8%)*	4 (1384.9)	*4 (479.4)*	3 (480.2)*	11 (6)*	4 (15.8%)*
FEDERAL ENERGY REGULATORY COMMISSION	2	6(22)	10(567)	8(259)	7(248)	8(43.7%)	9(963.7)	5 (453.3)	9(306.7)	7 (13)	13 (5.2%)
FEDERAL MARITIME COMMISSION	2	14(7)	15 (265)	11 (152)	8(227)	3(85.7%)	15 (539.1)	10 (260.2)	17 (140.6)	7 (13)	11 (5.7%)
FEDERAL TRADE COMMISSION	2	11(12)	19 (121)	18(47)	13(56)	7(46.3%)	2 (1741.0)	1 (720.3)	7 (355.7)	12 (5)	8 (8.9%)
FOOD AND DRUG ADMINISTRATION	2 or 20	22(1)	23(5)	24 (4)	24(4)	4(80%)	1 (1950.4)	19 (166.5)	1 (611.8)	20 (0)	20 (0%)

1 & 2	3	4	5	6	7	8	9	10	11	12	13
[1] DEPT. OF HOUSING & URBAN DEVELOPMENT											
[2] Interstate Land Sales Full Disclosure Act--Challenges to Registration Statements	12 & 21		(421)	(24)	(29)	(6.9%)	(350.1)	160.8	(91.0)	(0)	(0%)
[2] All Others	3		(217)	(52)	(94)	(43.3%)	(241.8)	162.0	(37.6)	(0)	(0%)
TOTALS FOR HUD	3, 12& 21	22(1)	9(638)	15 (76)	11(123)	15(19.3%)	21 (313.3)	20 (161.6)	22 (52.7)	20 (0)	20(0%)
INTERSTATE COMMERCE COMMISSION	1&8	4(55)	4(4594)	6 (1522)	4(847)	16(18.4%)	12 (736.0)	18 (179.7)	10 (297.5)	2(256)	2 (30.2%)
[1] DEPARTMENT OF LABOR											
[2] Compensation Claims Longshoremen's & Harbor Worker's Compensation Act	11		(3348)	(1586)	(505)	(15.1%)	(966.2)	(206.3)	(314.8)	(32)	(6.3%)
[2] Black Lung Benefits Reform Act	11		(1903)	(850)	(141)	(7.4%)	(523.7)	(188.6)	(331.7)	(2)	(1.4%)
[2] Federal Labor Disputes	19		(595)	(305)	(299)	(50.3%)	(503.1)	(218.0)	(146.0)	(4)	(13.4%)
[2] Service Contracts	20		(145)	(97)	(28)	(19.3%)	(873.8)	(224.9)	(238.6)	(0)	(0%)
[2] Wage Disputes	16		(32)	(25)	(4)	(12.5%)	(701.0)	(187.4)	(125.2)	(0)	(0%)
[2] Contracts Compliance Enforcement	20		(23)	(11)	(1)	(4.3%)	(829.0)	(336.0)	(65.0)	(0)	(0%)

1 & 2	3	4	5	6	7	8	9	10	11	12	13
[1] DEPARTMENT OF LABOR											
[2] Comprehensive Employment and Training Act (CETA) Disputes	2		(20)	(10)	(1)	(5%)	(179.5)	(143.7)	(223.0)	(0)	(0%)
[2] Public Contracts	12&16		(5)	(5)	(0)	(0%)	(616.0)	(255.4)	(--)	(--)	(--)
[2] Trade Certification	22		(16)	(11)	(--)	(--)	(232.4)	(133.5)	(--)	(--)	(--)
[2] Child Labor Disputes	22		(85)	(25)	(--)	(--)	(319.1)	(187.4)	(--)	(--)	(--)
TOTALS FOR DEPARTMENT OF LABOR	2,11,12, 16,20,22	3(66)	3(6172)	4 (2925)	3(979)	20(15.9%)	11 (764.3)	15 (200.4)	13 (262.4)	4 (38)	18 (3.9%)
[1] MARITIME ADMINISTRATION											
[2] Foreign Trade Subsidies	2		(5)	(5)	(--)	(--)	(251.6)	(153.0)	(--)	(--)	(--)
[2] All Others	11		(31)	(12)	(13)	(42.9%)	(1429.8)	(866.7)	(326.5)	(5)	(38.5%)
TOTALS FOR MARITIME ADMINISTRATION	2 & 11	20(3)	20(36)	22 (17)	21(13)	10(36.1%)	6 (1266.2)	2 (656.8)	8 (326.5)	12(5)	1(38.5%)
NATIONAL LABOR RELATIONS BOARD	2	2(115)	5(3820)	3(3820)	2(2686)	6(70.3%)	20 (386.8)	22 (103.8)	18 (123.5)	3 (125)	14 (4.7%)
NATIONAL TRANSPORTATION SAFETY BOARD	2 & 14	16(6)	6(1991)	7 (848)	6(352)	18(17.7%)	19 (389.2)	17 (185.4)	15 (152.6)	5 (23)	10 (6.5%)

1 & 2	3	4	5	6	7	8	9	10	11	12	13
NUCLEAR REGULATORY COMMISSION	8	22(1)	21(30)	20(28)	19(28)	2(93.3%)	3(1482.2)	7(375.7)	2(526.7)	20(0)	20(0%)
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION (1977-1978)	3	5(48)	2(7642)	2 (6762)	5(423)	23(5.5%)	*	12 (222.5)	4 (422)	*	*
[1]SECURITIES AND EXCHANGE COMM. [2] --Stop Orders, Broker/Dealer, Registration Suspension/Suspension of Practitioners	2		(219)	(57)	(42)	(19.2%)	(1415.1)	(543.5)	(383.0)	(5)	(11.9%)
[2] REG A & REG B Suspensions, Notices/Exemptions, Reg. Exempt., Investment Co. Exemptions	3		(56)	(30)	(7)	(12.5%)	(1107.6)	(371.3)	(565.7)	(0)	(0%)
TOTALS FOR SECURITIES AND EXCHANGE COMMISSION	2 & 3	14(7)	14(275)	13 (87)	15(49)	17(17.8%)	(51352.5)	3 (484)	5 (409.1)	12 (5)	6 (10.2%)
SOCIAL SECURITY ADMINISTRATION	12	1(698)	1(631,626)	SAME	1 (166,212)	12(26.3%)	23 (249.2)	23 (99.8)	24 (40.8)	1(7276)	16 (4.4%)
U.S. COAST GUARD	2	8(16)	7(1937)	5 (1672)	12(114)	22(5.9%)	18 (391.8)	24 (60.2)	11 (287.1)	6(21)	3 (18.4%)
U.S. INTERNATIONAL TRADE COMMISSION	1	21(2)	22(22)	21 (22)	20(22)	1(100%)	17(447.8)	15 (203.5)	20 (76.7)	18 (1)	15 (4.5%)
U.S. POSTAL SERVICE	20	21(2)	11(566)	10 (195)	10(125)	14(22.1%)	16 (453.8)	14 (209.9)	19 (102.3)	10 (7)	12 (5.6%)

*No information

IV. Assessing Agency Review

Simply describing the current review practices at federal agencies makes two points. First, there obviously is great variety in the subjects adjudicated by ALJs and in the structures used to review ALJ decisions. Second, the success of review is not closely connected with process variables under present agency review practices. The less easily analyzed situation variables -- factors extrinsic to the process -- are critical to the success of agency decision and review. This Part attempts to identify the variables most important to successful review, and suggests relations between certain review practices and particular variables.

A. Process Variables: Impact on Review

Neither the statistical evidence nor inferences readily drawn from the descriptions of current practices reveals a clear link between the process presently used for review and success under the evaluative criteria discussed in Part III (efficiency, accuracy, and acceptability). In looking at the statistical data, neither the level of review nor the declared degree of deference to prior decisionmakers is closely correlated with swift, useful, and acceptable review, although there is some evidence that agency head review as a general matter may be slightly less desirable than review by delegates at least so far as efficiency is concerned. Agency heads not only are the officials who are most highly paid,[355] but, more important, they are the ones for whose time conflicting demands are most numerous. Since, absent fallow periods in their work schedules, review must displace other activities,[356] insofar as these officers actually engage in review, it is the most expensive review per reviewer per day. Review by agency head also involves somewhat more time than other review relative to the length of AJL proceedings. If AJL time reflects the difficulty or importance of cases, agency head review adds to the length of decision time more than its proportionate to these factors. At least at the most general level, agency head review thus seems relatively inefficient. Agency head review also provides somewhat less to decisional accuracy than review at other levels within the agency as measured by the rate for reversal of ALJ decisions. The acceptability of agency head review may be somewhat greater than that of review by other officials if parties value the rank of the reviewer more than the degree to which they have a claim on his attention. A comparison of categories in which review is at the instance of nongovernment parties reveals substantially higher review rates where agency head review is available than where it is not. More than 40 percent of the cases for which agency head review is available of right are reviewed, while review of right without agency head involvement results in only a 15 percent rate of review.[357] On the other hand, the improbability of agency heads giving extensive consideration to most cases has prompted some commentary and litigation as well.[358] The data on review rates give some succor to the notion that the interest of agency heads in reviewing ALJ decisions is substantially less than the interest of nongovernment parties in obtaining agency head review. In those instances in which review may be declined, less than eight percent of the agencies' caseload is reviewed.[359]

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[355] See 5 U.S.C. §§ 5312-5315 (1976); Exec. Ord. 12,330, 46 Fed. Reg. 50,921 (1981).

[356] See Freedman Report, supra note 93, at 136 (discussing the FCC's conclusions regarding the benefit of its review board in saving time of Commissioners for other activities); see also Robinson, supra note 7, at 216-17 (noting, inter alia, the amount of information presented to an agency, and the difficulty of sorting out the relevant from the irrelevant material, in relation to agency members' dependence on staff).

Statistically, alternative review levels seem in some respects marginally preferable to agency head review. On a composite basis (that is, aggregating all programs that utilize a given review level), review by appeals board or by other designate of the agency head involves a lower review rate, a more speedy review time relative to ALJ decision time, and higher reversal rates of ALJ decisions. The actual monetary cost of review cannot be ascertained with confidence. While review is less expensive per man-hour at the appeals board or individual designate level, the salaries of these reviewers are not far below those paid to members of regulatory commissions, and the appeals boards involve several reviewers. Moreover, the agency head has a larger staff at his disposal and is more likely to shift the actual review burden substantially onto the shoulders of officials who are less highly paid than formally designated reviewers.

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[357] Agency head review of right following ALJ decision is category 2. Agency head review of right after an intermediate agency review is provided in categories 8, 13, 14, and 15. Review of right without agency head involvement is found in categories 11 and 20. If one looks at the review rate for completed ALJ decisions, not for total cases, the figures are 70% for category 8, 54.4% for category 2, and 41.5% for category 14. Completed decisions in categories 11 and 20 are reviewed at a 36.3% rate. See Review Data, Appendix 2.2, supra.

[358] See, e.g., Freedman Report, supra note 93, at 132-34, and note 144 supra.

[359] See figures for category 3, in Review Data, Appendix 2.2, supra.

If the true hourly expense is difficult to calculate, one can conclude that agency head and delegate review differ in the time taken. Appeal boards do slightly better than agency heads in the relation of review time to ALJ decision time, while individual designates do a great deal better. The lower opportunity cost of delegate review in combination with the shorter review time gives it a plausible advantage in efficiency over agency head review. It can be questioned whether the figures on review time relative to ALJ decisions time might not be skewed by inclusion within the categories subject to agency head review of a greater number of cases with considerable policy implications but less significant factual complexities. Those cases could, perhaps, be more easily resolved at the ALJ stage than on review by officials chiefly concerned with policy. The proportion of such cases in each category, however, cannot readily be ascertained.

Drawing conclusions about the accuracy of different processes is even more difficult than in the case of efficiency. Both delegate review processes do produce reversal rates higher than agency head review, and the relatively lengthier appeals board review produces higher reversal rates than individual designate review. Drawing accuracy conclusions from this fact, however, is not easy. The higher reversal rates, at least as an initial proposition, seem likely to spring from more extensive consideration by designates, although an alternative hypothesis is that the views of designates (collegial or individual) and ALJs diverge more than do those of agency heads and ALJs. Still, absent adjustment for degree of attention, the agency head is in a better position than his designate to review decisions for conformity to agency (as well as congressional and executive) policy. Agency head review at least gives greater assurance that the highest official within the agency approves of the decision since he either puts his imprimatur on it or confides each review determination effectively to someone in whose judgment on the particular issue the agency head has confidence.

Yet, the degree to which the designates' decisions are inferior to agency heads' as guarantors of accuracy is an open question. The more responsive to the agency head designates are and the more freely replaced, the closer the fit between agency head and designate views. If designates are assumed to be more responsive to agency heads than are ALJs (who are less controllable by the agency head), even if each review decision by a designate could be made more accurate were it scrutinized by the agency head, the higher refusal rate taken as an indication that accuracy is in fact advanced more by designate review. On the other hand, the officials to whom review is committed formally often are insulated from policymaking personnel in much the same way as ALJs. Even though they are more likely than ALJs to be veterans of the employing agency (thus, presumably attuned to its policies), reviewers generally are appointed for an indefinite term and are not subject to reassignment if their views and policymakers' views diverge.

Conclusions respecting the relative acceptability of different review levels are even more problematic. Acceptability arguably is less for both designate review processes (board or individual) than for agency head review, although the higher reversal rates and sense of more careful scrutiny by the nominal reviewers, who generally are civil servants of extremely high rank, may offset the preference for higher level review. The lower review figures for delegate review could indicate greater acceptance of the ALJ determinations at issue rather than less acceptance of the review available. Indeed, situation variables discussed below make this explanation quite plausible, given the nature of the decisions for which agency head review is most likely.

The impact of the other principal process variable, the type of review, is perhaps more ambiguous than the effect of the review level, although a few generalizations can be offered. The most obvious difference separating automatic review of initial ALJ decisions, review of right, and discretionary review of initial ALJ decisions is the review rate. Automatic review generally yields the highest review rate, followed in order by review of right and discretionary review. Little useful information, however, can be derived from these differences, since they are the natural corollaries of these review types. The one reasonable conclusion from these data is that discretionary review should rate lower on acceptability to nongovernmental parties than the other review types and higher on acceptability to government officials involved with review. The acceptability differential nonetheless may be quite slight in light of the fact that the ability to secure review (or, conversely, the requirement to grant review), does not mandate any specific quality of review. Discretionary review may involve as searching a scrutiny of cases as the other types of review, including cases that as a formal matter are denied review. Moreover, the review rates for different agencies and programs vary substantially within review types. Discretionary review is granted by the CAB in nearly 75% of the relevant cases as compared to 5.5% of OSHRC's caseload, while review of right ranges from less than 3% for EPA and the 5% to 6% level in the Department of Labor and the Coast Guard to 80% or more in the FDA and FMC.

The contribution of each review type to accuracy may shed more light on the intensity of review. By and large, review of right seems to produce higher reversal rates than other review types, ranging from 9.1% for category 8 (review of right by appeals board, further review discretionary) to 5.5% for category 20 (review of right by designate, no further review). Automatic review produces reversal rates between 4.4% for category 19 (final review by designate) and 0 for category 16 (designate review, discretionary further review), and discretionary review reversal rates also run from 4.4% (category 12, final review by appeals board) to 0 (category 21, final designate review). The individual variation within each review type is substantial, but no agency using discretionary or automatic review produces a reversal rate above 7% while eight agencies using review of right have higher reversal rates, five of them above 10%, three above 15%, and the Maritime Administration's rate reaching nearly 40%.

None of the review types has a clear advantage in efficiency. The review time for review of recommended decisions invariably falls below the median time for agency review of ALJ decisions, but the agencies' efficiency relativel to ALJ decision time is less plain. Two agencies (DEA and USITC) do extremely well relative to ALJ decision time, one (Labor) tolerably well, and one (CAB) extremely poorly. Review of right and discretionary review seem evenly matched on efficiency grounds. Each runs the gamut from among the most time consuming agency review process to the least, and each is used by some agencies for which review time is quite small relative to ALJ decision time as well as by others for which the relation of review to decision time is reversed. Given the relative frequency of reversal by agencies providing review as a matter of right, it may be that review time is a better investment for those agencies than for agencies employing discretionary review, but the higher proportion of cases that must be reviewed formally increases the total investment for review of right. On balance, the figures do not provide a basis for finding one type of review generally preferable to the others.

B. Situation Variables: Looking for Relevant Factors

If process variables do not correlate strongly with successful review, what factors do? The simplest place to start may be examination o the agencies that appear to do especially well or poorly on the statistical measures of review's success. There are six instances in which the present review process seems to work unusually well. All six involve review by agency head or individual designate and all six involve either automatic review or review of right. The six include review at the Department of Agriculture, the Drug Enforcement Administration, U.S. International Trade Commission, U.S. Postal Service, and the Federal Trade Commission. In each case review is relatively efficient, makes an appreciable contribution to accuracy, and also rates high on acceptability. The agency review time at each is less than half the ALJ decision time,[360] review is provided in a significant percentage of cases (from almost half the formal ALJ decisions to all of them), and reversal rates range between 4.4% and 9.5%. The FTC is distinct from the other agencies in that its cases take much longer at both the decision and review stages. The average case at the FTC takes two years at the ALJ level and almost an additional year for review.[361] Decision time in the other agencies noted here averages between 7 and 16 months with review time of one and a half to six months.[362]

Only one of these agencies (Agriculture) is now a cabinet-level, executive department, and, along with the Postal Service, the Agriculture department uses a Judicial Officer to hear appeals from ALJ decisions.[363] In both agencies, the Judicial Officer has a very high civil service (or equivalent) rank and has had extensive experience with that agency's adjudicatory process.[364] The Drug Enforcement Agency is a bureau of the Department of Justice, while U.S.I.T.C. and F.T.C. are independent agencies. None of the review, thus, is performed by cabinet officers, although among the reviewers are the agency heads in one single-head departmental bureau and two collegial, independent commissions. The adjudicatory caseload at each agency is relatively small, with only Agriculture and the Postal Service (the agencies employing Judicial Officers) rising appreciably above 40 cases a year. The adjudications at all of the agencies consist principally of enforcement actions.

At the opposite extreme are agencies like the Food and Drug Administration and the Nuclear Regulatory Commission where review seems costly and of questionable value. At FDA, cases take a bit more than five months at the ALJ stage but more than four timnes as long for review. Moreover, the FDA's adjudications spend a total of about three years along the route to disposition beyond the two years spent in decision and review. Every formal ALJ decision and all but one case disposition were reviewed by the Administrator in the three-year period FY1976-FY1978, with no reversals but with remands in every case. At NRC, the disparity between ALJ time and review time is less, though still bad, but the result of review seems less useful. The ALJ decision takes over a year on average to which review adds almost another year and a hald, and an additional two years is spend in preliminaries and waiting. All formal decisions and all but two case dispositions were reviewed in the period studied but none was reversed. Review in both agencies is of right, and the decisions at both involve the grant, revocation, or modification of valuable licenses.

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[360] See Review Data, Appendix 2.4, supra; See also Appendix to Part IV, correlations in Graphs 13-14, infra. Review time at the Drug Enforcement Administration is less than one-fifth the agency's average ALJ decision time.

[361] See Review Data, Appendix 2.1, 2.4, supra.

[362] Id.

[363] See 7 C.F.R. § 2.35 (1982); 39 C.F.R. §§ 954.15, 954.20 (1981). See also note 304, supra.

[364] Information from Letter, supra note 287, and conversation with James A. Cohen, Judicial Officer, U.S. Postal Service (memorandum on file with author).

Several other agencies duplicate some, but not all, of the problems of decision and review at the FDA and NRC. Review by the Commandant of the Coast Guard takes more than four times as long as does ALJ decision. That review, however, which though available of right is used in less than six percent of the cases disposed of by the agency, results in reversal of the ALJ decision almost one time in five. The CAB must review all decisions involving foreign air carrier permits and the Board's decision is only recommendatory, subject to Presidential action. Thus, it is no surprise that nearly 90% of these cases disposed of in any fashion (including within the base figures cases terminated by withdrawal of the carrier's application) find their way to Board review. It is, however, striking that review took half again as long as ALJ decision and produced no reversals in the 82 cases reviewed in FY1976-FY1978. The Consumer Products Safety Commission's review of right also takes substantially longer than ALJ decision (also about half again as long), but produces a significant (11%) reversal rate.

Unfortunately, these examples, while confirming the lack of correlation with process variables, on their face reveal little about the circumstances that may be congenial or uncongenial to any specific review process. The examples of review that on statistical bases does poorly on at least one of the criteria cut across review levels, different lengths of ALJ decision, and large and small adjudicatory caseloads. Both FDA and NRC have relatively small caseloads and great investments of time prior to the commencement of the ALJ decision process. Most of the agencies where review works well, however, also have relatively small caseloads, excepting only the Department of Agriculture and Postal Service which use judicial officers. Most of the better and the worse review alike is provided automatically or of right. Enforcement decisions are represented in both good and bad columns, while licensing cases seem to be found disproportionately in the latter group. Both groups include mainly agencies that are independent or are bureaus of executive departments, but most agencies that employ ALJs are independent agencies or distinct bureaus.

More information can be had from an examination of the patterns of review and reversal, but here, too, the lessons to be drawn are small. Two strong and three weaker but still significant correlations of situation variables with review's length or output appear to obtain. First, ALJ caseload has an inverse correlation with the rate of review of ALJ decisions. The more cases heard by an ALJ each year the lower the percentage of decisions that will be reviewed. Of the eleven agencies with ALJ caseloads below thirteen cases per year, none had less than a 25% review rate, only one had a rate below 30%, and six reviewed 70% or more of the adjudicatory cases disposed of in any fashion, including settlement or withdrawal. Of the 13 agencies with ALJ caseloads of 13 or more, only one had a review rate above 30%, and only two were above 25%, while four reviewed less than 10% and three less than 6% of the agency's adjudicatory caseload. Two related, but less strongly correlated, determinants of review rate are the time taken for ALJ decisions and the size of the agency's total adjudicatory caseload. Generally, longer average decision time at the ALJ level increases the likelihood of review. Of the thirteen agencies at which the ALJ level takes less than 225 days, the review rate exceeds 25% in only four. For the remaining eleven agencies, the review rate falls below 25% in only two instances. The six agencies with exceptionally high review rates, however, divide evenly between these camps. None of the nine agencies that disposed of less than 275 adjudicatory cases in FY1976-FY1978 had a review rate below 30%, and this group includes five of the six agencies that reviewed 70% or more. Only two of the remaining fifteen agencies with caseloads of 275 or more reviewed more than 30% of those cases.

Two of the factors related to review rates also relate to reversal rates. At six agencies, the average time for ALJ decision exceeds 400 days. Reversal rates at those agencies range from 5% to nearly 40%, with five of the agencies reversing roughly 9% or more of the decisions reviewed and three more than 10%. For the five agencies at which ALJ decisions average between 225 and 400 days, reversal rates for three are in about the 4% to 6% range, with one at zero, and the remaining agency at 11%. Nine of the remaining twelve agencies (with average ALJ decision time under 225 days) have reversal rates below 7%, eight of those below 6%, seven below 5%, and three of them at zero. Reversal rates, thus, generally rise as ALJ decision time increases. The opposite relation exists between reversal rates and ALJ caseload, reversal rates falling as ALJ caseloads rise. All of the agencies with reversal rates above 10% (six agencies) have adjudicatory caseloads of less than 45 cases per ALJ per year. Without weighting by number of cases, the five agencies with the highest average caseload per ALJ (more than 50 cases annually) in combination have an average reversal rate of only 5%; the nine agencies with heaviest ALJ caseloads (more than 30) have a combined reversal rate of 6.8%; and the agencies with ALJ caseloads below 30 have a combined rate of 9.9%. All of the agencies together have a reversal rate of 8.7%.

These figures support the belief that current rates of agency review and reversal of ALJ decisions are determined much more by the nature of the matter adjudicated than by the review process used or the identity of the reviewers. Where ALJs dispose of many cases of short duration, review and reversal will be less frequent than where ALJs decide few cases of long duration. Since the smaller docket-longer case paradigm probably indicates that ALJs are deciding more difficult and more important cases -- perhaps because the fact pattern is harder to unravel, the parties to the case are more numerous, the policy implications are more pronounced, or the policy at issue is less clear -- it is reasonable to expect higher rates both of review and of reversal in those instances.

A second inference from these figures confirms the intuition, embodied among other places in ACUS Recommendation 68-6, that more deference to subordinate decisionmakers generally is appropriate where large numbers of decisions are involved. The decrease in review rates with increasing agency adjudicatory dockets (as distinct from caseload per ALJ) may reflect agency reaction to an increased the imposition on the reviewer. Absent an increase in the number of reviewers commensurate to the increase in agency caseload, a constant review rate would impose a greater burden on the reviewer. The burden could be lessened by alternatives to a lower review rate, such as by a decrease in the reviewer's other (non-review) responsibilities or, of course, by an increase in the number of reviewers. Some agencies have attempted to reduce review burdens both by spreading the review function and by reducing reviewers' non-review functions. At the NLRB, for example, which lacks authority formally to decline to entertain appeals, review in most cases effectively is by one of the five Board members (and, in fact, a goodly share of the review burden is borne by the member's staff), and the Board members engage in little activity other than case review.[365]

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[365] See Bernstein, The NLRB's Adjudication-Rulemaking Dilemma Under the Administrative Procedure Act, 79 YALE L.J. 571 (1970); Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 YALE L.J. 729 (1961). The NLRB's aversion to rulemaking was the subject of controversy before the Supreme Court in National Labor Relations Bd. v. Wyman-Gordon C., 394 U.S. 759 (1969), and National Labor Relations Board v. Bell Aerospace Co., 416 U.S. 267 (1974). Of course, it cnnot be ascertained whether the lack of non-adjudicatory activity (such as rulemaking) accounts for the greater incidence of review or *vice versa*.

C. Policy and Process

While the legislative and administrative judgments embodied in current practice seem generally in accord that more difficult cases should be reviewed more frequently and more extensively, and some efforts such as suggested by ACUS 68-6 to improve efficiency have been made to shift and spread the review burden, the most important element in the review equation may be one that cannot without inordinate effort be lifted out of the statistical information. The difficulty of a case, as observed earlier,[366] can derive from many sources, including the complexity of factual issues, the number of factual issues, the importance of the case, and the opacity or clarity of the policy determinations that might govern it. Any of these factors might be correlated with length of ALJ decision time, but especially with respect to the last two factors there is no reason to expect a particularly close relation. Insofar as administrative law judges and policymaking officials have different incentives to respond to certain persons, groups, and interests, the value of particular cases to those two classes of official decisionmakers probably will diverge. They may differ as to the nature of the policy followed by the agency in similar cases, the impact of particular circumstances on the disposition of the specific matter at hand,[367] or the relative importance of investing time and care in this case as opposed to other cases.[368]

The likelihood of differences over these policy matters is not the only reason agencies may provide for review of ALJ decisions. Belief that a second evaluation of factual decisions provides a useful check on the accuracy of ALJs determinations could support review.[369] So, too, could the parties' interest in security against the arbitrary decision of a single official; even apart from the result produced, parties may value the opportunity for a second opinion.[370] Review premised on these grounds, however, probably issues. Among other things, the reviewer and the sort of review appropriate to these concerns -- factual accuracy and process values -- differ from those apposite to concerns over policy. The reviewer for factual accuracy need not have any connection with or special knowledge of agency policymaking, and the review probably should be deferential. There is little reason to believe that ALJs are more prone to factual inaccuracy than the reviewer, at least absent some third-level decisionmaker who has an advantage in evaluating factual information, who monitors the initial reviewer's decisions, and who gives him better incentives than ALJs have to concentrate on the factfinding task.[371] For review designed to meet process concerns, there likewise is no need for a reviewer with policy expertise, and indeed to the extent that policy expertise goes hand-in-hand with incentives adverse to the outside parties' interests, policy expertise may be a negative factor.[372] Process-based review, however, could entail any degree of deference to the ALJ depending on how the process values (which favor no deference) are balanced against efficiency values (which favor deference except in extreme cases).

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[366] See discussion in text, at Part III.A, following note 142 supra.

[367] This is in large measure the argument of those who favor greater ALJ independence. See, e.g., Davis, supra note 13, at 402-408; Gladstone, supra note 42, at 242-45; Segal, supra note 42, at 1428. See also Marzloff, Delay in Review of Initial Decisions: The Case for Giving More Finality to the Findings of Fact of the Administrative Law Judge, 35 WASH, & LEE L. REV. 393 (1978). These persons see more politically responsive government officials as improperly influenced by congressmen, industry representatives, or others.

[368] See, e.g., COMPTROLLER GENERAL, supra note 70.

[369] See Chassman & Rolston, supra note 81; Corber, A Practitioner Looks at the Effectiveness of the Agency Review Process, 26 AD. L. Rev. 67 (1974).

The review practices at many agencies seem largely designed in keeping with these fact and process concerns. The judicial model is built on these considerations, and many agency decision and review practices follow that model fairly closely. The functioning of intermediate review boards at the FCC and NRC and the review by Judicial Officer at Agriculture, for example, are patterned on the judicial model. In each instance the reviewers have no other duties within the agency, are segregated from the agency's policymakers, share with ALJs the absence of real promotion, pay, and assignment job controls, and can engage in review *de novo* of matters brought before them.[373]

The different success of review at these agencies -- in speed, in effect of review, and in acceptance by those who deal with the agencies -- suggests that the judicial model may be more suited to some agency decisions than to others. The review processes at the FCC and Agriculture work well because, *inter alia*, the matters committed to the ALJs and to the judicial reviewers are largely factual; policy matters as to which substantial ex ante guidance has not been given are decided by the agency heads rather than by policy-insulated personnel. Beyond that, the FCC, which while successful has been less so than the Department of Agriculture at reducing the policy component of adjudications, retains the right to review the cases where policy considerations are strongly implicated.[374] The FCC has structured this right so that deference to ALJ and Review Board decisions is the rule and Commission review can be and often is denied at low cost.[375] Yet, at the same time, the Commissioners can review any decision they think important (even if no party appeals), and their review can be de novo, reaching the factual findings that have policy significance as well as the more general policy judgments.[376] In contrast are agencies such as the NLRB, which has cast relatively little of its policy in rule form, making most policy decisions in the course of adjudications.[377] Its more political review process (requiring all reviews to be by the Board and not allowing delegation of that authority), while in one sense probably quite inefficient, at least is consistent with its approach to decisionmaking -- if policy is made in adjudications, the policymakers stand read in all cases to serve as the final adjudicators.[378]

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[370] *Cf.* Mashaw, *supra* note 23.

[371] *See* Marzloff, *supra* note 367, *see also* discussion, text at notes 70-79.

[372] *See* authorities cited at note 367, *supra*.

[373] *See* text at notes 173-85, 204-220, and 285-90, *supra*.

A less happy match of process to policy content is perhaps the NRC, which suffers not only from having left much of its policy free-form but also from interposing a judicial tribunal between the ALJ and the policymaking officials. The result is that while non-policymaking personnel cannot realistically be expected simply to find facts and apply the Commission's applicable rules, those are precisely the officers charged with review. The fact that in practice there appears to be a heavy presumption against reversal of the initial decision may indicate on the one hand that the intial decisionmakers are in accord with policymakers, or on the other hand that policymakers are so unsure what policies they should follow that even if they might have disagreed with the initial decision they will not overturn it. In neither case is extensive review justified. A different explanation for the NRC's two-level review might be that it advances process values, and indeed that has been the stated rationale.[379] It is, however, difficult to separate the "fair play" value of this very lengthy review process from the political benefit that agency policymakers might reap from delaying controversial decisions. If one group generally opposes the outcome that another, more influential group favors, one plausible decisionmaking strategy would be to decide the merits of cases in the second group's favor while delaying each decision's effect in order to gain some measure of acquiescence by the first group. Of course, it may be questioned in all events whether the efficiency cost of the NRC's process is excessive, whichever values it serves.

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[374] See 47 C.F.R. § § 1.115, 1.117 (1982); see also text at notes 237-243 supra.

[375] See 47 C.F.R. § 1.115(g) (1982).

[376] See, e.g., Cowles Florida Broadcasting, Inc., 60 F.C.C.2d 372 (1976) (full cite at note 242, supra).

[377] See generally Bernstein, supra note 365; Kahn, The NLRB and Higher Education: The failure of Policymaking Through Adjudication, 21 U.C.L.A. L. REV. 63 (1973); Peck, supra note 365.

[378] See Memorandum to Task Force on NLRB, Deciding Cases at the NLRB, Jan. 6, 1976 (on file with author). See also Diver, supra note 102, at 401-407.

The difference in review success among agencies employing similar review procedures and the number of different review processes used caution against simple solutions to perceived problems of lengthy agency adjudications procuding incoherent policy. The change in NRC processes, using an intermediate review board as suggested by ACUS 68-6, does not seem to have eliminated the difficulties that prompted adoption of that recommendation. One explanation is that although concern over policy coherence in part motivated the Conference's proposed change in procedure, the major impediments to policy coherence are not addressed by it. Administrators who are relieved of review responsibilities may have more time to formulate policies, and removal of adjudicatory decisionmaking to others -- especially to officials not subject to relatively direct control by the policymaking administrators -- encourages greater specificity in spelling out agency policies. Nonetheless, the real barriers to clear formulation and enunciation of agency policy lie elsewhere, notably in the absence of consensus on goals and in boundaries on the information officials possess and their capacity to base decisions on it.[380] Overcoming these obstacles entails costs, political as well as financial, and evaluation of the desirability of investing in takling these issues itself will turn on political judgments.

Whatever the magnitude of these impediments to coherent policy, there is only the slightest probability that agency decisionmaking will change in response to the marginal decrease in the cost of the agency head's time (from the decrease in duties allocated directly to him) and increase in incentives to spell out policies in advance (a corollary of the delegation of authority) that altered review practices can provide. In addition, the actual impact on an agency head's time of formally assigning review to subordinates is not likely to be nearly so great as at first appears since the agency heads already rely extensively on subordinates.[381] Moreover, the less significant the case, the more likely that agency heads' involvement will be minimized, whether review authority is formally retained at the top of the agency or assigned to an intermediate reviewer.[382] Decisions of substantial impact are apt to be reviewed by policymaking officials if they have discretion to do so; these are not cases policymakers are likely to release control over. The FCC's exercise of authority to review a group of cases involving matters such as the rates charged by AT&T along with that Commission's long-time exclusion of comparative hearings for broadcast licenses from Review Board jurisdiction[383] is illustrative.

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[379] See Tourtellotte, supra note 190, at 369-70; cf. Stewart supra note 187.

[380] See authorities cited at notes 73, 99 and 100, supra.

The structuring of review in some cases in line with the judicial model and in others with the political model does not reflect a cyclic majority sometimes favoring one model of agency action, sometimes another. Rather, the political consensus on how specific decisions should be made differs from issue to issue; hence, not only the polar alternatives of political or judicial-type review but also the spectrum of differing review practices including judicialized review with a political override,[384] judicial review with political input,[385] and the various particular reviewers and combinations of review discussed in Part III and its appendices. The influence of political judgments on process choices does not mean that suggestions cannot be advanced to rationalize decisional processes in keeping with the evaluative criteria discussed in Part III nor does it mean that such suggestions inevitably will be ineffectual. it does mean that these suggestions should be cognizant of the degree to which policy judgments and decisions of descriptive fact can--or, obviously, cannot--be segregated in particular classes of dispute and should attempt to match the different determinations with appropriate decisionmakers. It also means that any decisional process will be subject to criticism for being overly judicial or insufficiently judicial, depending on the critic's specific policy views.

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[381] *See*, *e.g.*, Gladstone, *supra* note 42, at 238-40.

[382] *Cf*. Cleary, *Some Aspects of Agency Review of Initial Decisions of Administrative Law Judges*, 31 LABOR L.J. 531, 535-38 (1980).

[383] *See* text at notes 236-243 *supra*.

[384] *See* discussion of FCC, text at notes 204-243 *supra*.

[385] *See* discussion of Interior Department Board of Land Appeals, text at notes 244-279 *supra*.

Thus, the operation of the Interior department's Board of Land Appeals, for example, may be disparaged as committing too much policymaking power to officials outside the control of those formally charged with making departmental policy;[386] or the Board might be reproved for allowing policymaking officials to influence the disposition of cases.[387] Yet absent better mechanisms for wholly separating policy issues from those cases or greater reason to fear the intercourse between officials, the IBLA procedures seem eminently defensible as a rational allocation of decisional authority -- cases in which issues of descriptive fact as a rule predominate are decided by and reviewed by officials whose comparative advantage lies in that effort, but when policy questions arise, policymakers are consulted.[388]

The allocation of decisionmaking responsibilities at Interior avoids difficulties attendant to processes that involve policymakers in descriptive factfinding or that involve policy decisions by persons who, in order to make them better factfinders, are insulated from policymakers. An example of the difficulties of this latter situation arose at the Environmental Protection Agency, which sometimes uses a Judicial Officer to review initial adjudicatory decisions in place of the Administrator.[389] At recent decision of the Judicial Officer held an entire EPA enforcement program invalid as contrary to the governing statute.[390] Neither the ALJ nor the Judicial Officer was persuaded by the argument put forward by the staff that this issue was beyond the adjudicating officers' jurisdiction, having been determined for the agency by the Administrator in adopting the rules under which the proceeding was brought.[391] Neither the ALJ nor the Judicial Officer is involved in the creation of enforcement programs. Even the most ardent proponent of the judicial model would be hard put to explain the advantages of allowing major policy decisions -- not individual penalty determinations that might arguably be subject to non-merits considerations -- to be made by such officials rather than by officers directly answerable to the President and the Congress. However one reads the relevant statute, whether supporting the Administrator's interpretation or the Judicial Officer's, that judgment is one appropriately made by the political actors subject to the checking power of judicial review.

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[386] See Strauss, supra note 251; cf. Scalia, supra note 19.

[387] Cf. Davis, supra note 13.

[388] See text at notes 278-279 supra.

[389] See 40 C.F.R. § 22.04(b) (1982).

[390] In reTransportation, Inc., Docket No. CAA (211)-27, Decision on Interlocutory Appeal, February 25, 1982.

[391] See id., and Order Denying Motion to Dismiss Complaint, June 25, 1981.

APPENDIX TO PART IV

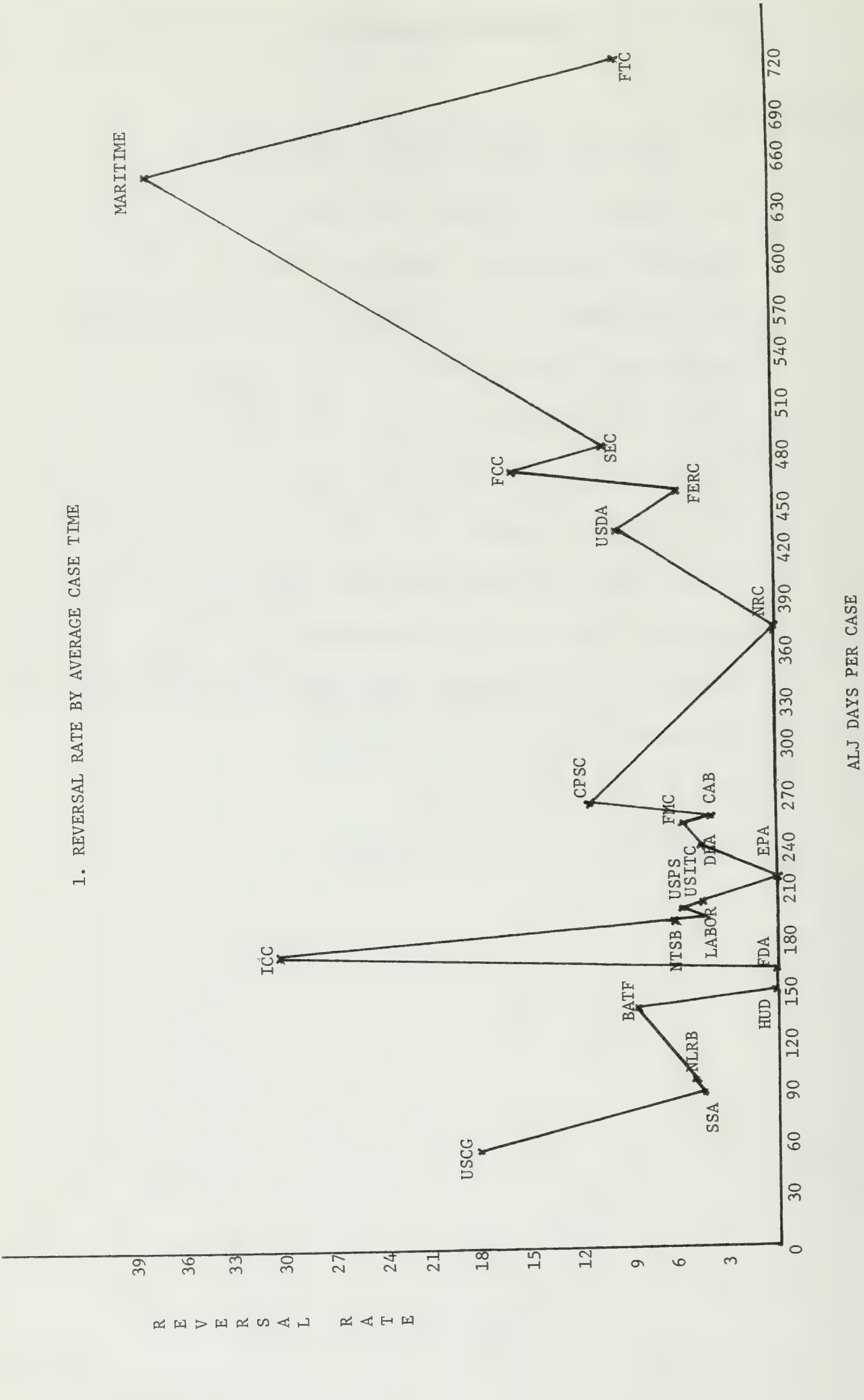
CORRELATIONS

APPENDIX TO PART IV:

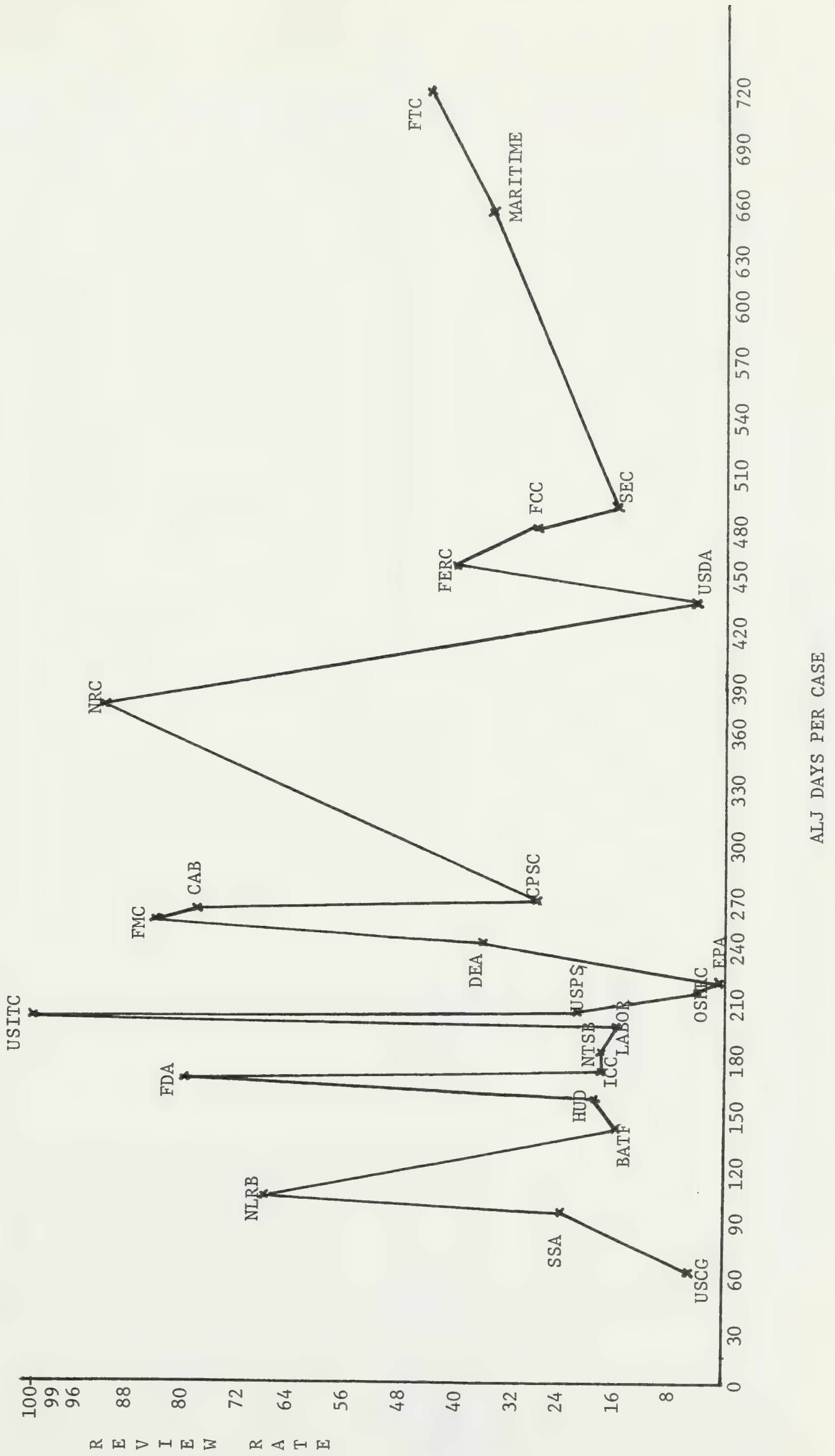
CORRELATIONS

1. Reversal Rate by Average Case Time
2. Review Rate by Average Case Time
3. Reversal Rate by ALJ Caseload: All Agencies
4. Reversal Rate by ALJ Caseload: Less Than 45 Cases
5. Review Rate by ALJ Caseload: All Agencies
6. Review Rate by ALJ Caseload: Less Than 15 Cases
7. Review Rate by ALJ Caseload: More Than 13 Cases
8. Review Rate by Agency Caseload: Less Than 1,000
9. Review Rate by Agency Caseload: More Than 1,000
10. Reversal Rate by Agency Caseload: Less Than 1,000
11. Reversal Rate by Agency Caseload: More Than 1,000
12. Reversal Rate by Review Caseload
13. Review Time, by Reviewer
14. Review Time, by Kind of Review

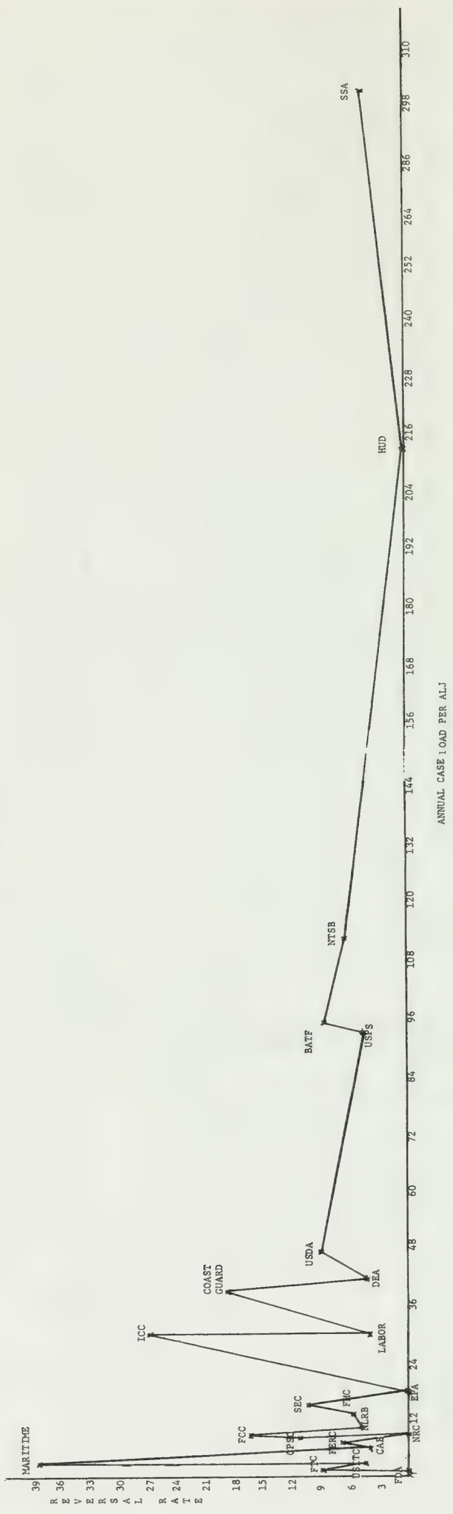
1. REVERSAL RATE BY AVERAGE CASE TIME



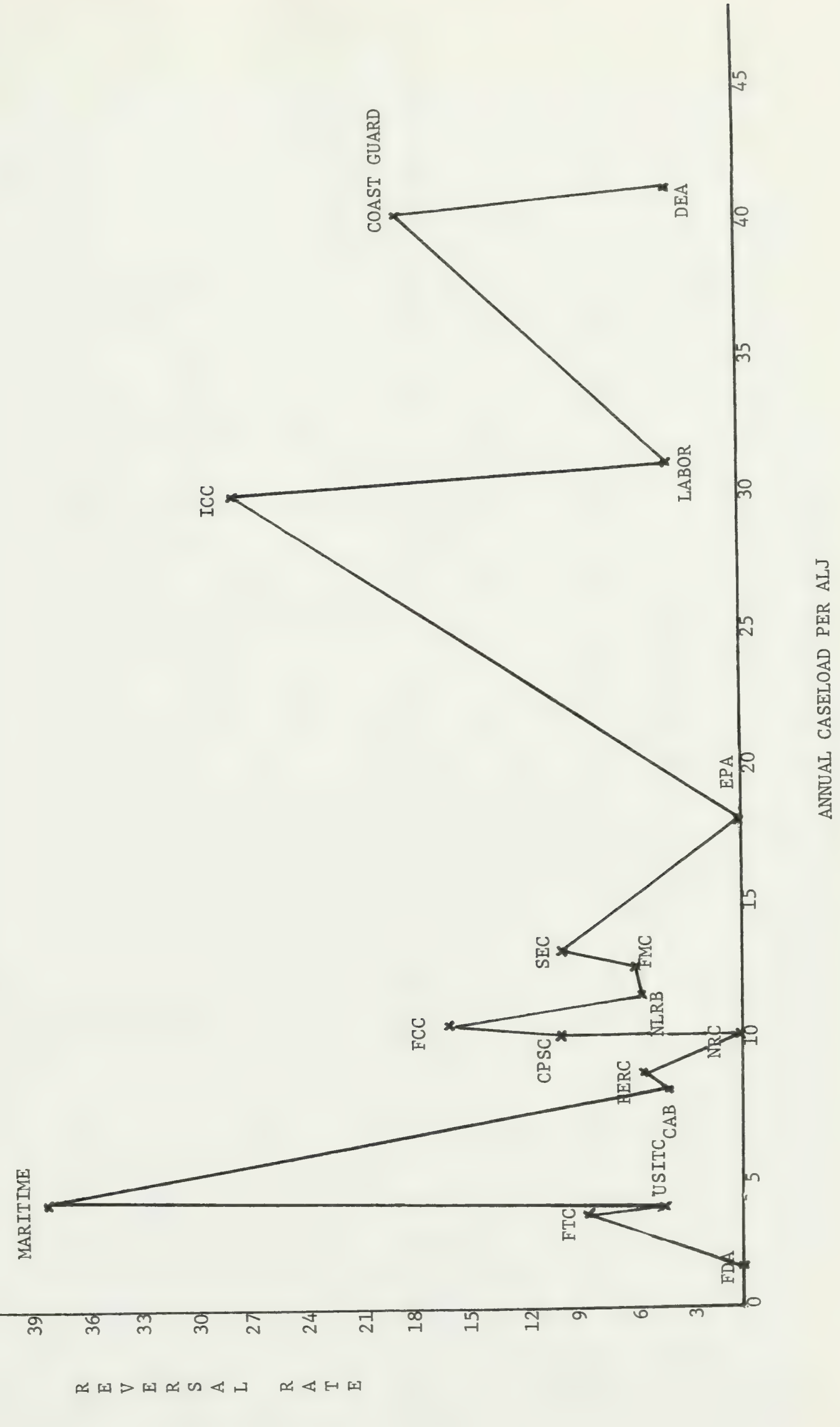
2. REVIEW RATE BY AVERAGE CASE TIME



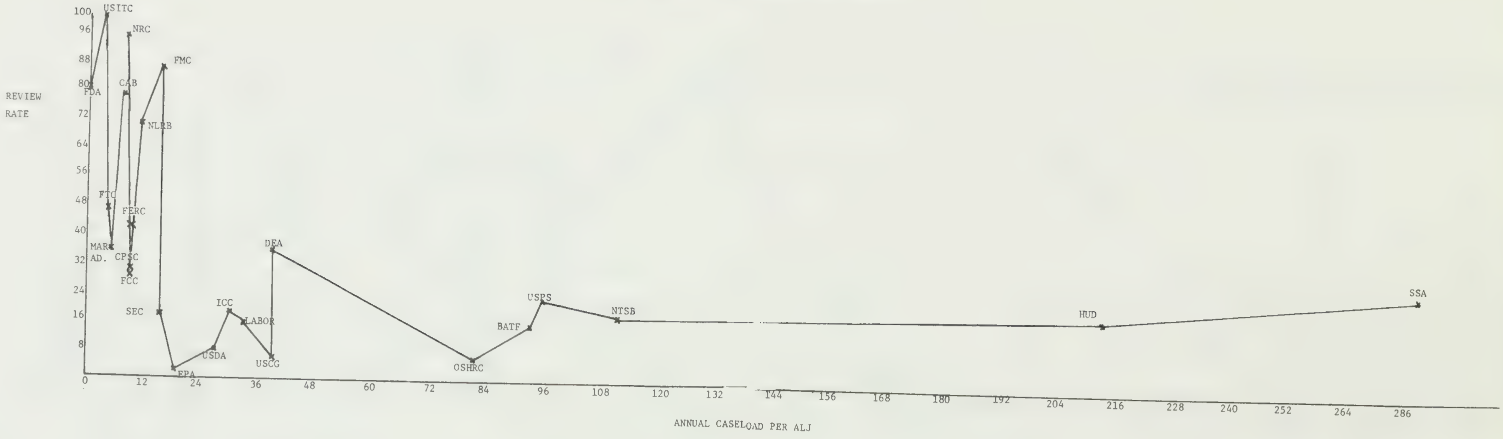
3. REVERSAL RATE BY ALJ CASELOAD: ALL AGENCIES



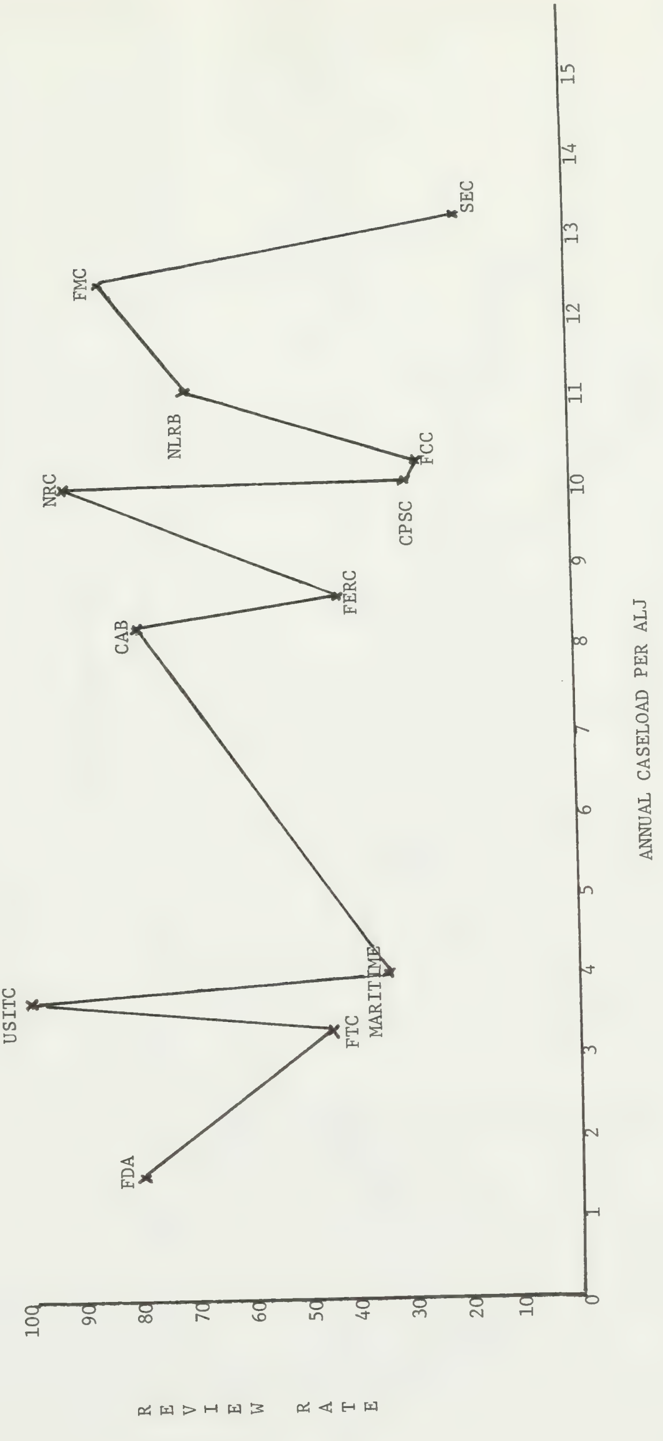
4. REVERSAL RATE BY ALJ CASELOAD: LESS THAN 45 CASES



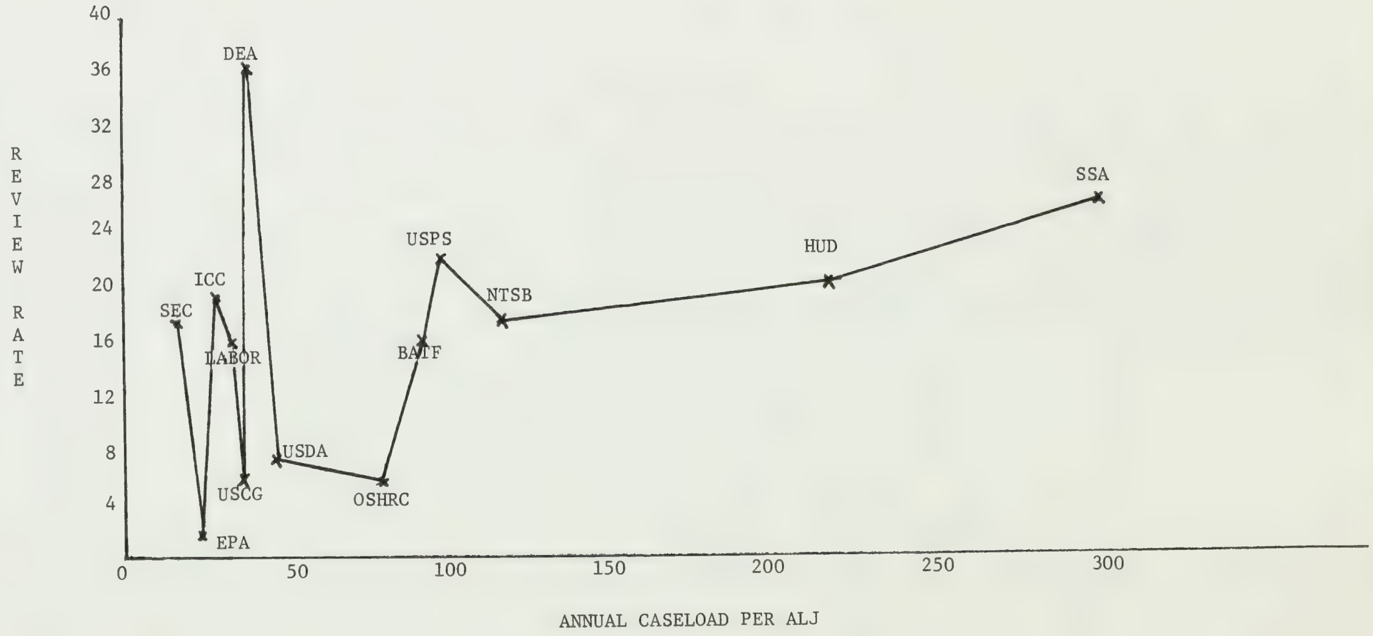
5. REVIEW RATE BY ALJ CASELOAD: ALL AGENCIES



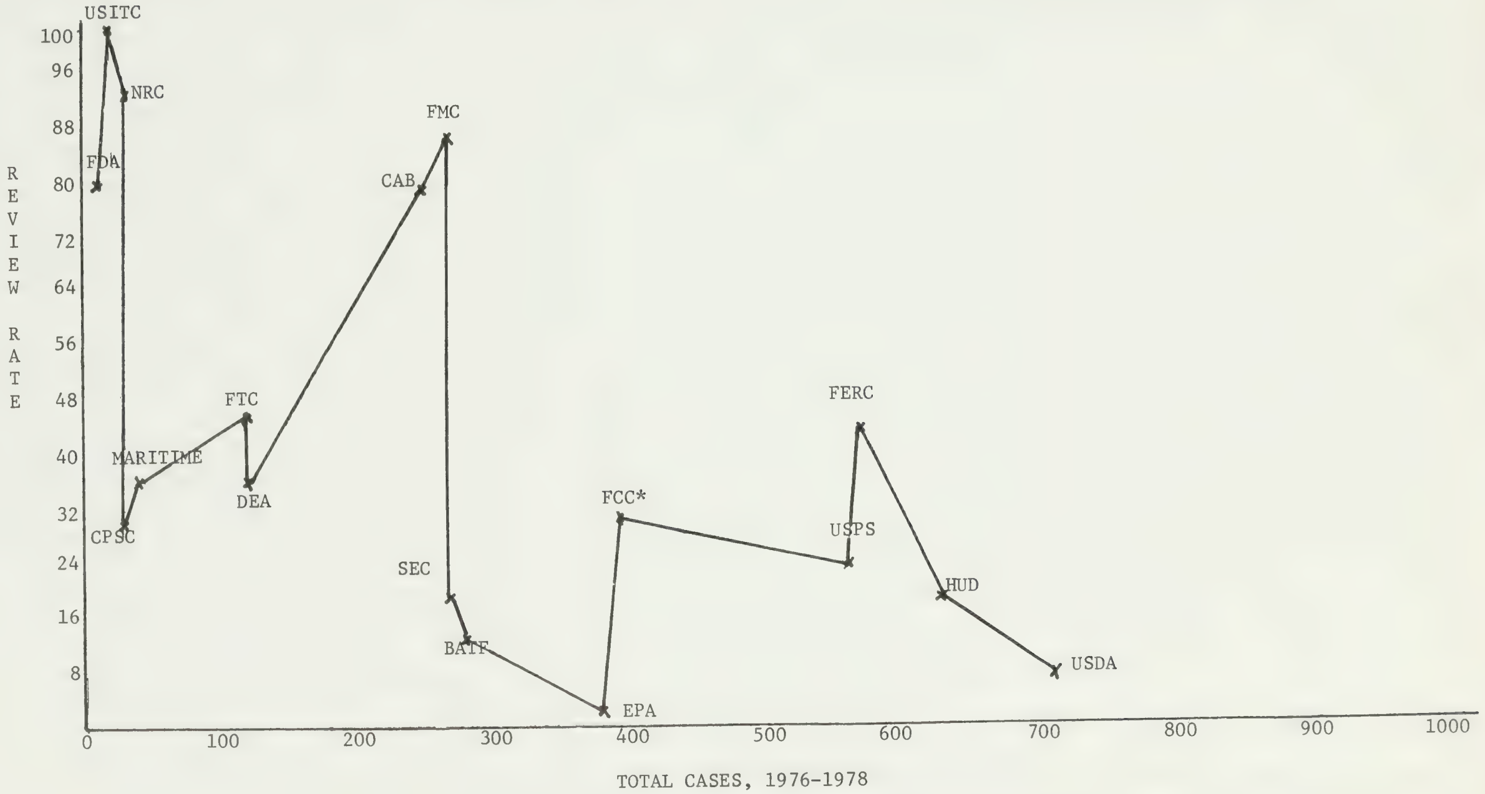
6. REVIEW RATE BY ALJ CASELOAD: LESS THAN 15 CASES



7. REVIEW RATE BY ALJ CASELOAD: MORE THAN 13 CASES

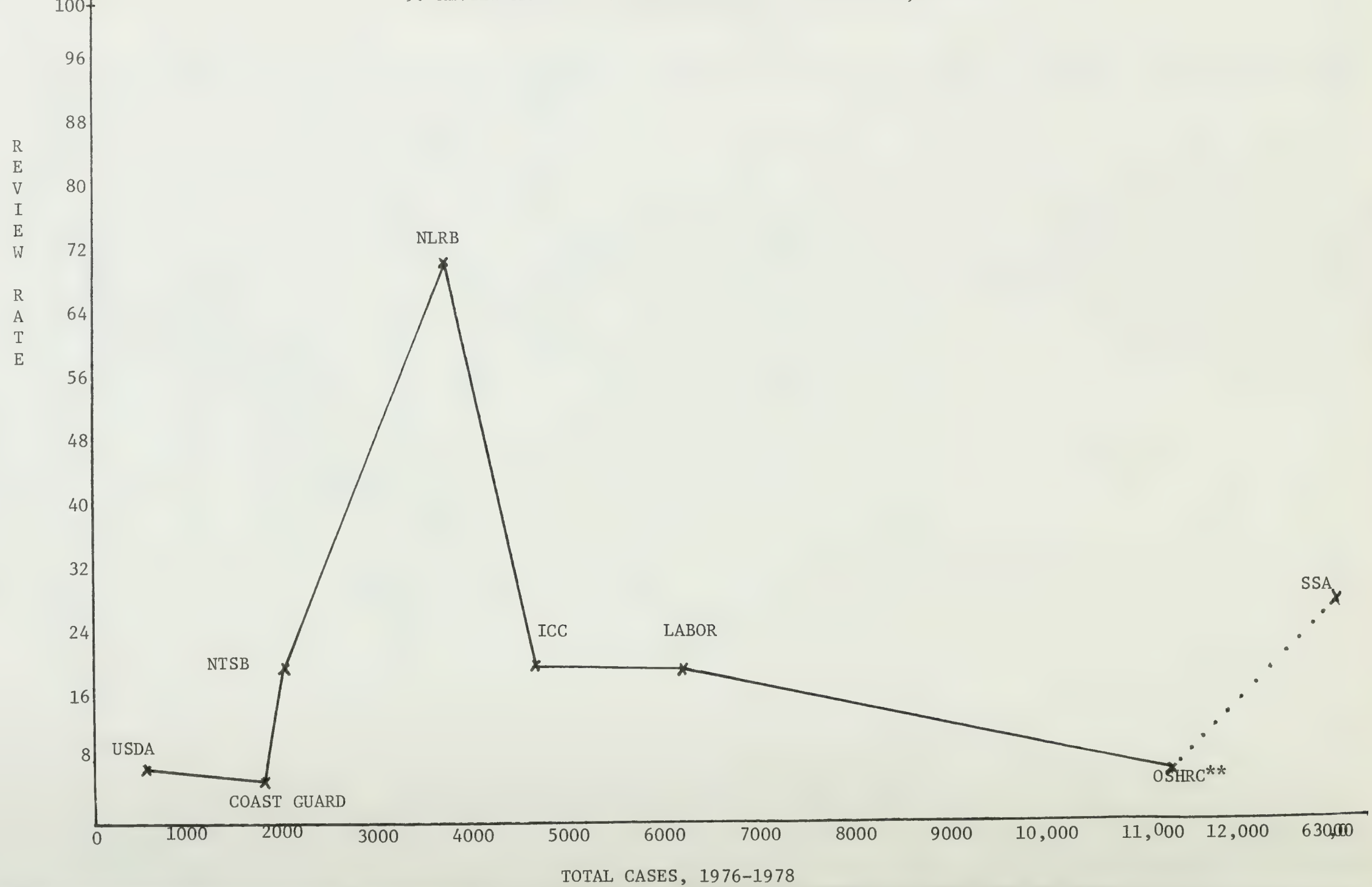


8. REVIEW RATE BY AGENCY CASELOAD: LESS THAN 1,000



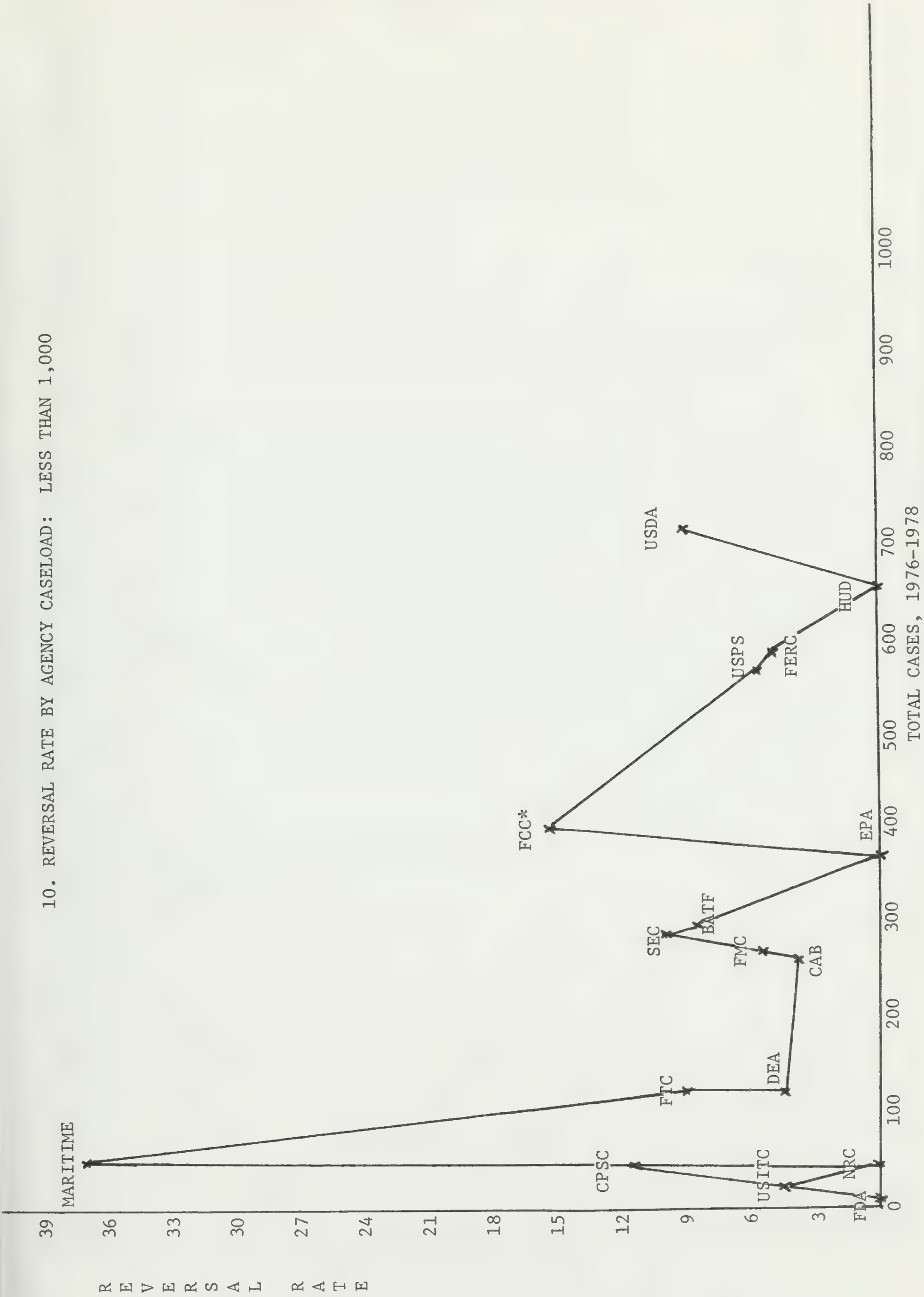
*Extrapolated from single year

9. REVIEW RATE BY AGENCY CASELOAD: MORE THAN 1,000



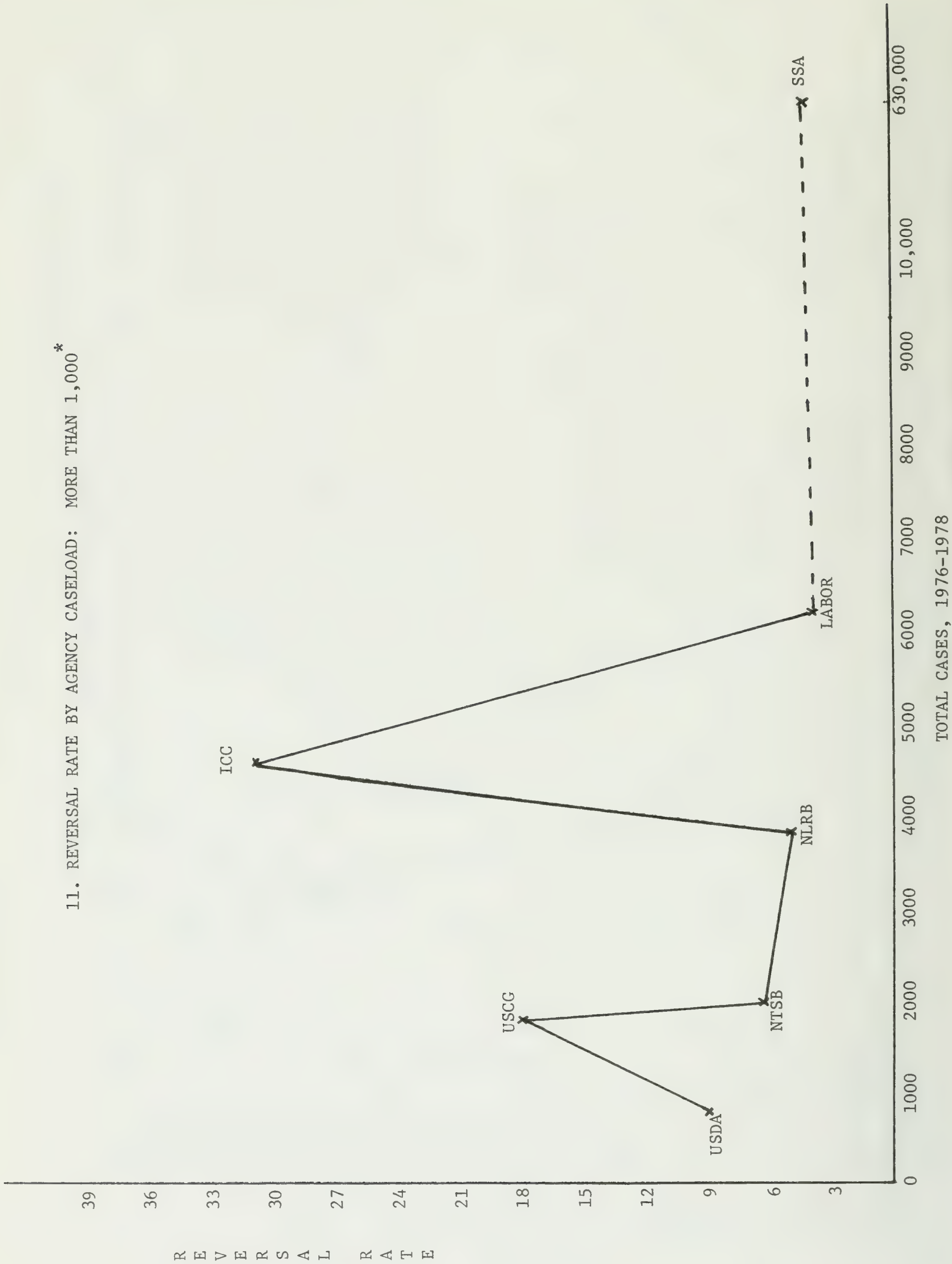
**Extrapolated from two years

10. REVERSAL RATE BY AGENCY CASELOAD: LESS THAN 1,000

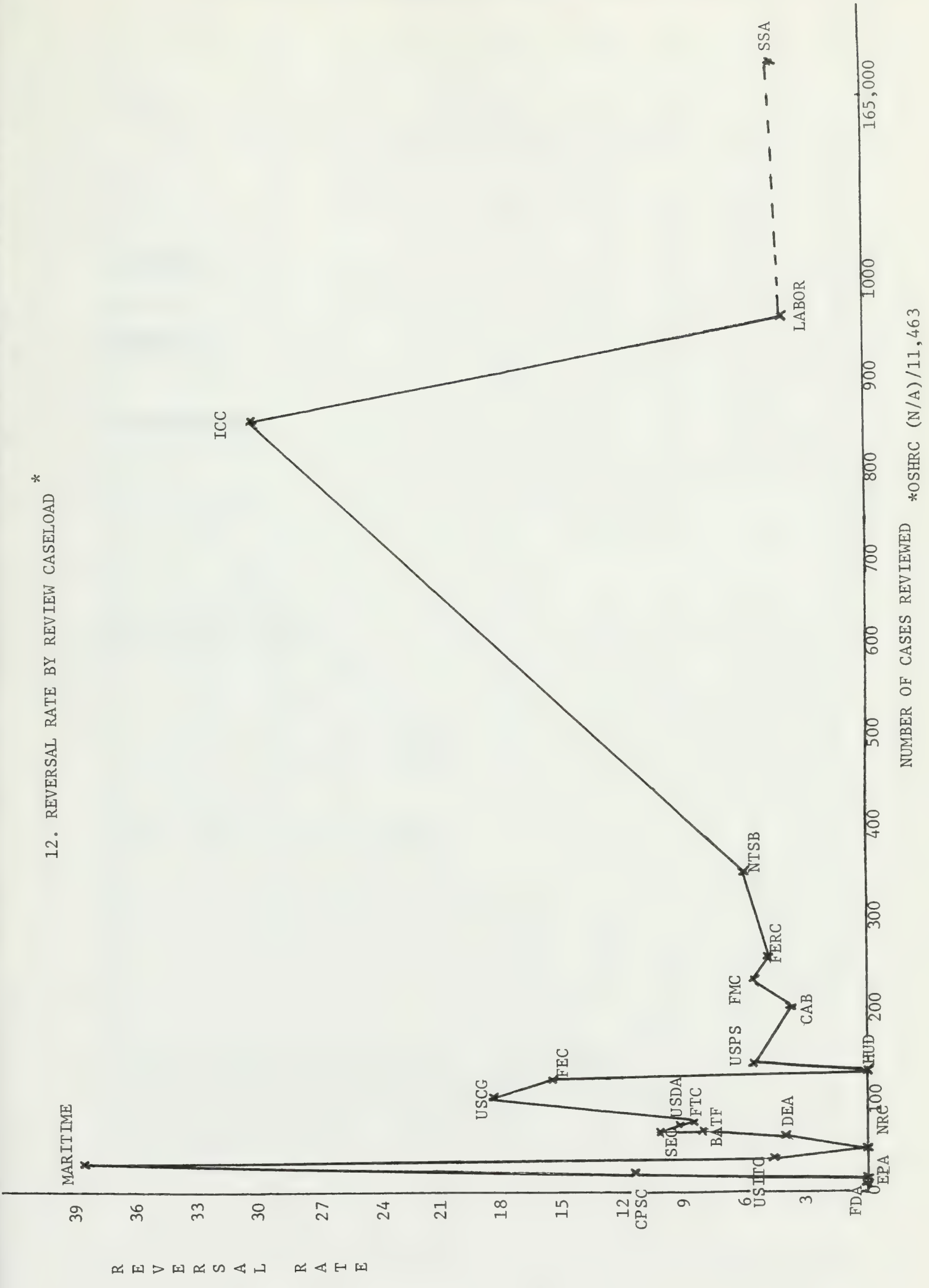


*Extrapolated from single year

11. REVERSAL RATE BY AGENCY CASELOAD: MORE THAN 1,000*

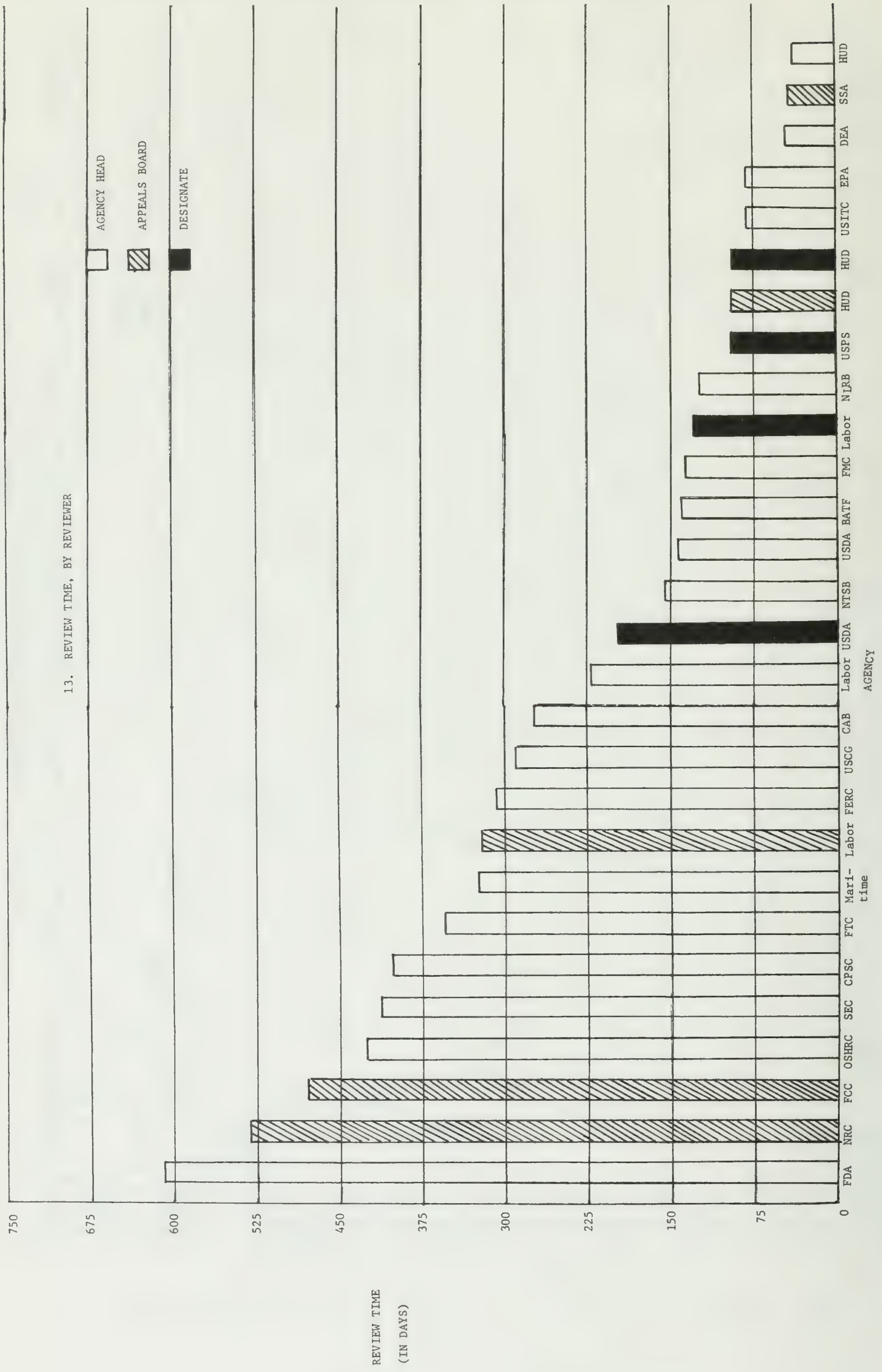


*OSHRC Reversal Rate Unavailable



12. REVERSAL RATE BY REVIEW CASELOAD *

*OSHRC (N/A)/11,463



13. REVIEW TIME, BY REVIEWER

BACKGROUND REPORT FOR RECOMMENDATION 83-4
(as published in Md. L. Rev., Vol. 43, No. 1, 1984)

USE OF THE FREEDOM OF INFORMATION ACT FOR DISCOVERY PURPOSES*

EDWARD A. TOMLINSON**

The Freedom of Information Act[1] (FOIA) and discovery provide separate mechanisms for obtaining the disclosure of government documents. Under the FOIA, any person may obtain any reasonably described agency records unless the records fall within one of the nine exemptions specified in the Act.[2] In discovery, on the other hand, a party to litigation may obtain—to the extent permitted by the applicable procedural rules—relevant, unprivileged government documents. A litigant's access to discovery raises the issue of whether the litigant should be permitted to use the FOIA for discovery purposes. At present, the two mechanisms are distinct, and a litigant has the same right of access under the FOIA as does any other FOIA requester.

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* The author prepared this article while serving as a consultant to the Administrative Conference of the United States. The views expressed are those of the author. For the Conference's action on the consultant's report, see *infra* note 3.

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[1] 5 U.S.C. § 552 (1982).

[2] *Id*. at § 552(b). Section 552(b) provides that:

This section does not apply to matters that are—

> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;
>
> (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
>
> (9) geological and geophysical information and data, including maps, concerning wells.
>
> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

This Article analyzes the advantages of FOIA access to litigants and the disadvantages it poses for the government. Part I identifies various uses of the FOIA for discovery purposes. Part II then compares the discovery available under the FOIA with that available in civil, criminal, and administrative proceedings. Part III describes in more detail eight different uses of the FOIA for discovery purposes. Finally, Part IV analyzes pending legislative proposals to restrict litigants' FOIA access. The Article concludes that Congress should not amend the FOIA to deny litigants the same access to agency records that is available to others, but that Congress should require a party to litigation with the government to notify government counsel of any discovery motivated FOIA requests.[3]

I. Introduction

A. The Relationship Between the FOIA and Discovery

Congress's fundamental design when it enacted the FOIA in 1966 was to permit the public to inform itself about the operations of government.[4] Because all members of the public are beneficiaries of the Act, a requester's rights are not affected by his litigation generated need for government records.[5] Discovery, on the other hand, is designed to narrow and clarify the issues in litigation and to ascertain the facts, or information as to the existence or whereabouts of facts, relevant to those issues.[6] In discovery, therefore, the strength of a party's litigation generated need for documents may result in the production of documents not available to the public; or, ironically, the weakness of a party's need may result in the withholding of documents obtainable through the FOIA. Because Congress designed the FOIA to provide a uniform, minimum level of access to government records, that access should remain available even though the FOIA requester also has access to discovery. Discovery should provide a second level of access available only to parties to litigation. Ideally, a party's access to relevant documents in discovery should be as great or greater than that available under the FOIA, and it should not be necessary to use the FOIA for discovery purposes.

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[3] At its Plenary Session on December 16, 1983, the Administrative Conference did not take a position on whether the Congress should limit the FOIA rights of litigants. The consultant's report favored the status quo. The Committee on Governmental Processes, whose report brought the matter to the floor, proposed that the Conference approve the provisions in S. 774 temporarily closing the FOIA to parties in litigation with the government. For a discussion of S. 774, see text accompanying notes 357-58. The Recommendation adopted by the Conference addressed only the notice requirement. It reads as follows:

> 1. Congress should amend the Freedom of Information Act (FOIA) to require a party to a judicial action or to an administrative adjudication or formal rulemaking proceeding, to which the Government is also a party, to notify counsel for the Government promptly of any FOIA requests made by the party, by his counsel, or by some other person acting on the party's behalf, during the pendency of the proceeding for the purpose of securing the release of agency records that may be relevant to the proceeding.
>
> 2. Congress should also provide that, if a party does not comply with this notice requirement, the court or agency conducting the proceeding may preclude the party from offering in the proceeding any agency records released in response to the request.

1 C.F.R. § 305.83-4 (1984).

[4] NLRB v. Sears Roebuck & Co., 421 U.S. 132, 143 n.10 (1975). When enacting the

Partly because discovery is not primarily a disclosure mechanism, the actual relationship between the FOIA and discovery is far more complicated. Although discovery does serve as a disclosure device, its primary function is to enable parties to litigation to prepare for trial or to settle a controversy without a trial. It is not designed to provide the parties with the first level, minimum access to government records that is available under the FOIA, and even the most generous rules of discovery do not always provide that level of access.

A second factor contributing to the complicated interaction between the FOIA and discovery is the limited nature of the government's disclosure obligations in discovery. Full discovery is normally available only for a short time before trial or hearing and only with respect to relevant documents. Less generous discovery is available in criminal proceedings than in civil actions, and in some agency adjudications, no formal discovery is available at all. Even with respect to civil actions, reformers, emphasizing that the purpose of discovery is not the disclosure of information but the simplification of issues, have urged the restructuring of discovery and other pretrial procedures, not to maximize the exchange of information, but to require the parties to focus their presentations in advance of trial.[7] The 1980 and 1983 amendments to

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FOIA, Congress recognized "the right of the individual to be able to find out how his Government is operating." H.R. REP. NO. 1497, 89th Cong., 2d Sess. 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2423. It also sought to ensure that the "private citizen" would be afforded "the essential information to enable him to deal effectively and knowledgeably with the Federal agencies." S. REP. NO. 813, 89th Cong., 1st Sess. 7 (1965).

[5] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 n.23 (1978).

[6] Hickman v. Taylor, 329 U.S. 495, 501 (1947).

[7] Lundquist, *Trial Lawyer or Litigator*, 7 LITIGATION, Summer, 1981, at 3. Mr. Lund-

the Federal Rules of Civil Procedure adopt the reformers' approach and seek to prevent "overdiscovery" by increasing the trial judge's supervisory role and reducing a party's access to information.[8]

Hence, discovery motivated uses of the FOIA are likely to occur despite the Supreme Court's admonition in *NLRB v. Robbins Tire & Rubber Co.*[9] that the FOIA was "not intended to function as a private discovery tool"[10] and despite the Court's earlier interpretation of the FOIA in *NLRB v. Sears Roebuck & Co.*[11] as "fundamentally designed to inform the public about agency action and not to benefit private litigants."[12] A litigant is a member of the general public and, in that capacity, is entitled under the FOIA to the same access to government records as is any other person. Thus, in both *Sears*[13] and *Robbins Tire*,[14] the Court explicitly recognized that although a FOIA requester's status as a party to litigation did not "enhance" his rights under the FOIA, that status did not "diminish" them.

B. Description of Present Study

Theoretical analysis of the relationship between the FOIA and discovery provides a framework for evaluating the various proposals to close the FOIA to litigants, but it is also necessary to consider the practical problems created for the government when a litigant has access to both the FOIA and discovery. To obtain information about the use of the FOIA for discovery purposes and about the problems that that use poses for government agencies, the author interviewed FOIA experts in twenty-eight agencies, at the Department of Justice, and in private practice.[15] The information obtained through these interviews was largely

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quist was a co-chairman of the American Bar Association's Special Committee for the Study of Discovery Abuse. The Committee was instrumental in securing the Supreme Court's adoption of the 1980 and 1983 amendments to the civil discovery rules.

[8] *See infra* text accompanying notes 104-14.

[9] 437 U.S. 214 (1978).

[10] *Id.* at 242.

[11] 421 U.S. 132 (1975).

[12] *Id.* at 143 n.10.

[13] *Id.*

[14] 437 U.S. at 242 n.23.

[15] The author and the Administrative Conference staff, on the basis of a preliminary survey of the case law and secondary literature, compiled an initial list of twenty-four agencies to contact for further information. The agencies constituted a good cross-section of the federal administrative establishment and included all agencies believed to have had substantial experience with the use of the FOIA for discovery purposes. In late December, 1982, the Chairman of the Conference wrote the general counsel of each agency on the list asking him to designate someone in his office knowledgeable on FOIA matters to serve as a contact. During the winter and spring of 1983, the author interviewed the agency contacts and usually followed up this initial interview by interviewing at least two or three additional agency offi-

impressionistic, because the agencies do not generate any hard data about the use of the FOIA for discovery purposes. An agency cannot require a FOIA requester to identify the purpose of his request, and the FOIA requester need not even properly identify himself (*i.e.*, he may employ a straw man or a service company to make the request). The mere fact that attorneys and regulated interests comprise a significant portion of an agency's FOIA requesters thus does not reveal much about the nature of the requests or about the problems the requests present to the agency.[16]

Nevertheless, several facts did emerge from the interviews. First, the FOIA is no substitute for pretrial discovery when the government is a party to the proceeding and adequate discovery is available. In this situation, agency and private lawyers agree that discovery is a more reliable disclosure mechanism and that a litigant is unlikely to obtain additional relevant documents through the FOIA. Hence, in litigation to which the government is a party, the heaviest use of the FOIA occurs

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cials recommended to him. The author also expanded the list of agencies to include four additional agencies which he contacted on his own initiative.

The interviewees in most agencies were lawyers. The initial contact in the majority of cases was the lawyer in the general counsel's office who handled (normally in an advisory capacity) appeals from initial denials of FOIA requests. The interviews focused on the FOIA's impact on the conduct of agency investigations and on the preparation of cases for trial. For this reason, an effort was made to interview agency litigators who were more likely to be informed on these matters than public information officers.

The author also interviewed approximately twenty attorneys in the Department of Justice (primarily in the Civil, Land and Natural Resources, and Tax Divisions) and approximately thirty private practitioners. The Justice Department lawyers were recommended to him by one of the co-directors of the Office of Information and Privacy in the Department and by agency attorneys with contacts in the Department. The private practitioners were contacted because of their known expertise on FOIA or discovery matters or because they were recommended by agency attorneys as persons to contact to obtain the practitioner's perspective on the use of the FOIA for discovery purposes. While there was no systematic basis for the selection of Justice Department attorneys and private practitioners, the author believes that he interviewed a representative sample of informed respondents. An effort to contact a larger group of private attorneys through a mailed questionnaire did not receive a statistically significant response.

The Chairman of the Conference contacted the following agencies: Department of Agriculture; Deparment of the Air Force; Department of Defense; Department of Energy; Department of Health and Human Services; Department of Housing and Urban Development; Department of the Interior; Department of Labor; Department of Transportation; Department of the Treasury; Commodity Futures Trading Commission (CFTC); EEOC; FCC; FERC; Federal Reserve Board; FTC; GSA; INS; IRS; NLRB; NRC; SEC.

The additional agencies contacted by the author were: Department of the Army; Department of the Navy; Department of State; CIA.

[16] For statistics on the heavy use of the FOIA at certain agencies (*e.g.*, the FDA, the SEC, and the Consumer Product Safety Commission) by attorneys and regulated interests, see Koch & Rubin, *A Proposal for a Comprehensive Restructuring of the Public Information System*, 1979 DUKE L.J. 1, 17 n.54.

prior to the commencement of the action, when discovery is not yet available. Parties or potential parties to private litigation also extensively use the FOIA. Many agency lawyers and private practitioners believe that in private litigation the FOIA is a more efficient mechanism for obtaining access to agency records than discovery.

A second fact that emerged from these interviews is that the use of the FOIA for discovery purposes often imposes a significant burden on government agencies. When the government is not a party to a proceeding, responding to FOIA requests may be no more burdensome than providing third party discovery—unless, of course, the discovering party asks the government to do both. The government's burden is more acute when it is a party because, although the government is normally able to prevent the release under the FOIA of documents that are privileged in the discovery context, the FOIA process favors disclosure and requires the government to work harder to protect privileged documents.[17] The FOIA also permits parties to circumvent relevancy, temporal, and other discovery restrictions designed "to secure the just, speedy and inexpensive determination of every action."[18] The use of the FOIA by parties to whom discovery is unavailable is particularly burdensome for government agencies.

Yet the interviews did not answer the crucial question of whether the burden, which primarily involves assigning government personnel, who might be more profitably engaged in other tasks, to FOIA matters, is unwarranted. Indeed, the bureaucratic burden is part of the cost of complying with the Act, for Congress has decided to afford all persons access to all nonexempt agency records. It is nonetheless disturbing to learn that in order to comply with the Act, the FBI, at the behest of federal prisoners, must assign hundreds of professional agents to review, on a line-by-line basis, closed investigatory files to determine which portions it may safely release.[19] Parties to litigation, like prisoners, often make FOIA requests because they have an incentive to do so. But is the burden of responding to these requests unwarranted when the same agency would respond in the same fashion to an identical request by a curious bystander? Perhaps the *level* of access available to the general public is too great. If the burden of responding to certain types of FOIA requests becomes too overwhelming, the proper remedy is not to bar requesters selectively, but to restrict the access available to everyone.[20]

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[17] In discovery, the government shares with other parties the attorney-client and work-product privileges. Among the privileges which are unique with the government are the state secrets privilege, the informer's privilege, the official information privilege, and the law enforcement evidentiary privilege. *See* Association for Women in Science v. Califano, 566 F.2d 339, 343-44 (D.C. Cir. 1977).

[18] FED. R. CIV. P. 1.

[19] 1 *Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 861-62 (1981) (testimony of William H. Webster, Director, FBI) [hereinafter cited as *Hearings*].

The interviews did disclose that parties make FOIA requests to supplement discovery because they believe they will receive more information, or receive it sooner. These advantages of the FOIA are most apparent when the controversy between the government and a potential party has not yet ripened into a formal proceeding in which the party has access to discovery. But parties to litigation may invoke the FOIA in other contexts and for a variety of reasons. Although the categories into which this article divides the various uses[21] are somewhat imprecise, categorization assists the analysis of why parties use the FOIA for discovery and how those techniques affect government agencies.

Finally, the interviews disclosed that the various uses of the FOIA for discovery purposes may overlap other, clearly permissible uses of the Act. Often, the distinction between informing the public and furthering one's own interest in litigation is not a sharp one, and FOIA requesters may have both purposes in mind. For example, a public interest organization such as the Natural Resources Defense Council may seek agency records both to inform the public of an environmental hazard and to use in a proceeding to which the organization is a party (*e.g.*, a licensing proceeding at the NRC). Likewise, a victim of governmental wrongdoing may use the FOIA both to influence government policy by publicizing the wrongdoing and to further a tort suit. In these instances, the FOIA should remain open to litigants even if they are barred from using the FOIA for discovery purposes.

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[20] For example, section 14 of S. 774, as approved by the Senate Judiciary Committee in June, 1983, excludes organized crime files from the entire Act for a period of five years from the date generated or acquired. Similarly, the Privacy Act, 5 U.S.C. § 552a, denies all requesters access to a large category of agency records that are primarily of interest to persons in litigation with the government. Section 552a(d)(5) exempts from the provisions of that Act "any information compiled in reasonable anticipation of civil action or proceeding." That exemption affords broader protection to an agency's case files than does the work product component of FOIA exemption b(5). Smiertka v. Department of the Treasury, 447 F. Supp. 221, 227-28 (D.D.C. 1978). Courts are divided on whether a first party FOIA requester (i.e., a requester seeking information about himself) may obtain records exempt under the Privacy Act. *See, e.g.,* Greentree v. United States Customs Serv., 674 F.2d 74 (D.C. Cir. 1982) (FOIA access available). *But see, e.g.,* Shapiro v. DEA, 721 F.2d 215 (7th Cir. 1983) (Privacy Act an exemption b(3) statute under the FOIA). In practice, most agencies have followed *Greentree*.

[21] Parties or potential parties to litigation use the FOIA as follows:

A. To obtain evidence or leads for a claim prior to filing suit against the government.
B. To obtain information about a potential governmental proceeding against the requester.
C. To obtain agency generated records for use in private litigation.
D. To obtain privately submitted agency records for use in private litigation.
E. To obtain agency records unavailable in discovery because they are privileged.
F. To obtain irrelevant agency records.
G. To obtain an additional search for relevant agency records.
H. To obtain agency records which are not adequately discoverable because of external limitations on discovery.

This article will not address one major use of the FOIA by potential litigants. Persons subject to agency regulation often use the FOIA to keep abreast of the agency's operative law and of studies that may lead to changes. Law firms representing energy companies, for example, often maintain their own libraries of Department of Energy records. Congressional testimony or other public utterances by departmental officials that reveal new factual studies or a possible change in policy invariably prompt FOIA requests for agency records on the matter. Lawyers in many specialized areas of practice similarly use the FOIA to obtain operational manuals and other internal materials prepared for the guidance of agency staff. Those records, which contain much of an agency's operative law and procedure, are very useful in dealing with an agency on a day-to-day basis even if the practitioner has no particular litigation in mind. If litigation does arise, he will have a head start in preparing for trial.

Use of the FOIA to gather information about an agency's internal operations is consistent with the Act's purpose of furthering open government because it permits regulated interests to deal more intelligently with the agency. The FOIA is thus immensely useful to the private practitioner who must advise a client whether a course of conduct is legal and prudent or who must appear informally before an agency on behalf of a client. As will be seen, the FOIA is less useful as a discovery device.[22] Although a party may avoid the time, scope, and other limitations on discovery requests, the FOIA only affords a party the first level access to agency records that is available to the general public. To prepare adequately for a trial or hearing, a party must participate in the exchange of information and the narrowing of issues which are the hallmarks of discovery.

C. Summary of Conclusions

The use of the FOIA for discovery purposes takes many forms. As will be seen, some discovery uses are plainly appropriate (*e.g.*, the prelitigation use of the FOIA to discover the factual basis for a lawsuit), while others are more questionable (*e.g.*, a party's use of the FOIA to require an agency to conduct additional or duplicative searches). In addition to the burdens imposed by discovery motivated FOIA requests, the availability of the FOIA as a discovery tool may also disadvantage the government in litigation. Despite the problems associated with the use of the FOIA for discovery purposes, it is neither fair nor workable to deny a litigant access to records available to anyone else. Discrimination based on a requester's status is inconsistent with the FOIA's basic goal of providing all members of the public with first level access to information about the operations of government.

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[22] *See infra* Part III.

The argument for treating persons using the FOIA for discovery purposes differently than nondiscovery motivated requesters is premised upon the belief that litigants do not need the FOIA because they have, or will have, access to discovery. Why then, the argument goes, should parties or potential parties to litigation be permitted to burden the government with FOIA requests that may delay the government's response to other FOIA requests or disrupt the government's trial preparation?

This rationale for closing the FOIA to litigants is not convincing. A party to litigation "needs" the FOIA because discovery is not designed to afford, and often does not afford, the first level access to government documents available to any person under the FOIA. When the government makes an inadequate discovery search, raises a claim of privilege, obtains a protective order, or contends that the documents sought are irrelevant, a party needs the FOIA at least as much as anyone else does. While in theory a discovering party should obtain all the government documents necessary to prepare for trial or hearing, functional considerations (*i.e.*, the goal of resolving controversies in a timely fashion) may influence a discovery system or court to interpret narrowly a party's discovery needs. In these situations, a requester's status as a party should not reduce his rights under the FOIA.[23] Although a party's FOIA requests may be burdensome, it is both unfair and unenforceable for an agency to deny a party the first level access which it affords to other FOIA requesters whose interest in obtaining the records almost surely will be less than that of the party.[24]

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[23] It seems particularly unjustified to deprive a defendant of his statutory right of access to government records merely because the government has initiated a proceeding against him.

[24] A FOIA requester's status as a party to litigation likewise should not enlarge his access to agency records. Even under exemptions b(6) and b(7)(C), where the agency must balance the public interest in disclosure against the privacy interests which would be invaded by disclosure, it is the public's interest in disclosure that is dispositive. Washington Post Co. v. Department of Health and Human Servs., 690 F.2d 252, 260 (D.C. Cir. 1982). The party requester also should not receive any preferential treatment in the processing of his request. Courts have held that a requester's need for records in collateral litigation does not constitute a "genuine need and reason for urgency" permitting him to gain access to government records ahead of prior FOIA requesters. Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605, 616 (D.C. Cir. 1976); Mitsubishi Elec. Co. v. Department of Justice, 39 Ad. L.

The use of the FOIA for discovery purposes is nevertheless a matter of valid concern because that use, unlike others, may disadvantage the government's position in litigation. First, a party in litigation with the government may obtain agency records without the knowledge of government counsel and then use those records to surprise him at trial or hearing. Second, the party may disrupt the government's preparation by seeking, perhaps on the eve of the trial or hearing, the release of records in the government's litigation files. The government then must divert its attention from trial preparation in order to prevent a FOIA release to an opposing party of sensitive, nondisclosable records. Under the FOIA, unlike in discovery, the government does not enjoy the protection of a cut-off date for the making of requests or of a neutral judge to resolve disputes. Third, a party may request the government to produce the same documents under the FOIA and in discovery, thus necessitating duplicative searches and releases. In these cases, the government's primary concern is not the extra burden imposed on the agency's public information office in processing the FOIA request—that is part of the cost of having a Freedom of Information Act—but the burden imposed on government counsel who must prevent inadvertent FOIA releases and remain informed of government documents obtained by opposing parties.

The disadvantages to the government are substantial, but they do not accompany most uses of the FOIA for discovery purposes. Parties in litigation with the government use the FOIA for discovery purposes because they expect to obtain the release of agency records not obtainable in discovery, or only obtainable in a less convenient fashion or at a later time. They seldom use the FOIA to surprise government counsel, to disrupt counsel's trial preparation, or to require the government to conduct duplicative searches. Abusive FOIA requests occur most frequently prior to the commencement of criminal and administrative enforcement proceedings by the persons under investigation. Thus, proposals to close the FOIA to parties to *pending* proceedings would provide agencies with limited relief.

On the other hand, the government will receive some protection from the abuses which occur if a party in litigation with the government must notify government counsel of all discovery motivated FOIA re-

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Rep. 2d 1133 (D.D.C. 1976); Gonzalez v. DEA, 2 GOV'T DISCLOSURE SERV. ¶ 81,016 (D.D.C. 1980); Rivera v. DEA, 2 GOV'T DISCLOSURE SERV. ¶ 81,365 (D.D.C. 1981); Greentree v. DEA, 1 GOV'T DISCLOSURE SERV. ¶ 80,201 (D.D.C. 1980), *rev'd on other grounds*, 674 F.2d 74 (D.C. Cir. 1982). However, one court ordered expedited processing of a FOIA request filed by a criminal defendant in a state capital prosecution. *See* Cleaver v. Kelley, 427 F. Supp. 80 (D.D.C. 1976).

quests. A "discovery motivated" FOIA request is a request made by a party, his counsel, or some person acting on his behalf, for the purpose of obtaining information for use in pending litigation with the government. If counsel representing the government receives notice of these FOIA requests, he will be able to determine what records the agency plans to release and thus eliminate any danger of surprise at trial or hearing. Further, government counsel will be able to coordinate FOIA and discovery searches and to avoid duplicative releases. Although he still may need to divert his attention from trial preparation to assist the agency's public information office in resisting the disclosure of exempt records, advance notice of FOIA requests should enhance counsel's ability to protect litigation files. Because such notice would afford the government considerable relief from abuse of the FOIA, Congress should amend the FOIA to require notice and reject proposals to close the FOIA to litigants.[25]

II. Document Discovery under the FOIA and the Rules of Discovery: A Comparison

It is necessary to consider how the FOIA and discovery systems function to understand why agencies object to some uses of the FOIA for discovery purposes and why litigants continue to use the FOIA despite the fact that discovery is ordinarily the more reliable way to obtain documents for use in litigation. The FOIA offers litigants an invariable level of discovery unaffected by differences in the discovery rules applicable to civil, criminal, and agency proceedings. Even under a single set of rules, discovery varies according to the subject matter of the proceeding. For example, the civil rules permit more discovery in tort suits against state or federal officials for constitutional violations,[26] or in antitrust suits brought by the government,[27] than in nonstatutory review proceedings, in which the court limits its review to the agency record.[28]

From the government's perspective, the FOIA is open to all the abuses of discovery without supplying any of discovery's concomitant advantages. Parties can make massive demands for irrelevant documents, deliberately request nondisclosable documents, and file multiple requests for the same information. In discovery, such unreasonable requests are tempered by a mutuality of interest in exchanging information and by the presence of a neutral umpire. In the FOIA process, on the other hand, only one side receives any disclosure, and there is no satisfactory mechanism for limiting unreasonable requests. Not only are discovery motivated FOIA requests less useful in resolving lawsuits, but they place a greater burden on the government than do similar discovery requests. For even though agency records that are privileged in discovery almost always are exempt under the FOIA, the agency usually must work harder under the FOIA to protect the same documents. In particular, the FOIA gives an agency less time to respond to requests and requires it to provide a more detailed justification for withholding a document.

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[25] For further discussion of the notice proposal, see *infra* Part IV(c).

[26] *See* Wood v. Breier, 54 F.R.D. 7, 10-11 (E.D. Wis. 1972).

[27] *See* United States v. IBM, 67 F.R.D. 40, 43 n.3 (S.D.N.Y. 1975).

[28] *See* McMillan & Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Factfinding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333, 333-34.

A. The Release of Agency Records Under the FOIA

The Act makes it very easy to make a FOIA request. The requester need only "reasonably describe" the records he wants and comply with the agency's published rules on the "time, place, fees (if any), and procedures to be followed."[29] The burdens placed on the agency are much greater. It must decide within ten working days[30] whether to comply with the request, determine any appeal from an initial denial within twenty working days after receipt of the appeal,[31] and notify the requester of the reasons for its determination.[32] Upon notice to a requester, an agency may extend the time limits for only ten working days in "unusual circumstances."[33] If an agency fails to meet the time limits,[34] or withholds a requested record by claiming an exemption, the requester may file suit to compel disclosure.[35] Within thirty days of service, the agency must serve an answer or otherwise plead to the complaint.[36] The court then must expedite the case in every way[37] and determine de novo whether the agency improperly withheld any records.[38]

In court the agency has the burden of sustaining its action in withholding records.[39] To avoid summary judgment the agency must either produce the records or establish that they are nonexistent or exempt.[40] An agency must file detailed affidavits to justify exemption claims. The requester, who has not seen the records and thus has little basis for challenging the affidavits, normally moves the court to order the agency to file a *Vaughn* index,[41] which contains in affidavit form a detailed itemization of the withheld records (often on a paragraph-by-paragraph or line-by-line basis). The agency must cross-reference each item to the statutory bases for the withholding and to the justifications advanced in the agency's other affidavits. Courts require a detailed breakdown of the withheld records because the agency must establish, not only that each record contains exempt matter, but that none contain any reasonably segregable, nonexempt matter.[42]

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[29] 5 U.S.C. § 552(a)(3) (1982).

[30] 5 U.S.C. § 552(a)(6)(A)(i) (1982).

[31] 5 U.S.C. § 552(a)(6)(A)(ii) (1982).

[32] 5 U.S.C. § 552(a)(6)(A)(i) (1982).

[33] Agencies may take extra time to search distant offices for records, to examine a voluminous amount of records, or to consult other agencies. 5 U.S.C. § 552(6)(B)(i)-(iii) (1982).

[34] *See* 5 U.S.C. § 552(a)(6)(C) (1982).

[35] 5 U.S.C. § 552(a)(4)(B) (1982) permits requesters to sue in the district court in the district in which the requester resides or has his place of business, in which the records are kept, or in the District of Columbia.

[36] 5 U.S.C. § 552(a)(4)(C) (1982).

[37] 5 U.S.C. § 552(a)(4)(D) (1982).

[38] 5 U.S.C. § 552(a)(4)(B) (1982).

[39] *Id.*

The *Vaughn* index serves a twofold purpose: first, it permits a requester to argue intelligently for the nonexempt status of a document; and second, it permits the court to avoid conducting an in camera proceeding.[43] Although the district court has statutory authority to examine agency records in camera,[44] case law strongly disfavors such inspections because they are burdensome and lack the benefit of an adversary presentation.[45]

The lack of in camera review imposes a significant burden of justification on the government.[46] Although the courts of appeals have emphasized that the district courts must be flexible in allowing the government to protect the confidentiality of its records (*e.g.*, by making some of its showing in camera or by submitting a randomly selected sample of the documents for in camera inspection),[47] district courts normally order the government to submit a detailed *Vaughn* index.[48] Too often the FOIA court focuses not on the question of whether the records themselves are exempt, but on whether the agency's stated justification for withholding them is adequate. This situation is made tolerable only by the deference[49] accorded agency determinations on such questions as whether a record is properly classified (exemption b(1)),[50] whether the release of an investigatory record would interfere with law enforcement proceedings (exemption b(7)(A)),[51] or whether the release of an investigatory record would constitute an unwarranted invasion of personal privacy (exemption b(7)(C)).[52]

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[40] National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973).

[41] The term is derived from the first case in which a court ordered the government to prepare such an index, Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

[42] 5 U.S.C. § 552(b) (1982) requires the release of reasonably segregable nonexempt portions of otherwise exempt records.

[43] *See* Ingle v. Department of Justice, 698 F.2d 259, 263-64 (6th Cir. 1983); *Vaughn*, 484 F.2d at 824-25.

[44] 5 U.S.C. § 552(a)(4)(B) (1982).

[45] *See, e.g.,* Weissman v. CIA, 565 F.2d 692, 697 (D.C. Cir. 1977); Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242, 250 n.10 (D.C. Cir. 1977); *Ingle*, 698 F.2d at 264-65; Currie v. IRS, 704 F.2d 523, 530-31 (11th Cir. 1983).

[46] This burden is particularly onerous in cases involving the withholding of information for national security reasons. *See, e.g.*, Stein v. Department of Justice, 662 F.2d 1245 (7th Cir. 1981); Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981); Terkel v. Kelly, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

[47] *See, e.g., Stein*, 662 F.2d 1245, 1254; Stephenson v. IRS, 629 F.2d 1140, 1145-46 (5th Cir. 1980); Vaughn v. Rosen, 523 F.2d 1136, at 1139-40 (D.C. Cir. 1975).

[48] Ironically, requesters also are unhappy with the FOIA's "awkward" mechanism for

The disclosure process is quite different in discovery despite the occasional use of some FOIA procedures to resolve discovery disputes. Except with respect to claims of privilege for state secrets, in camera review of withheld documents is the norm.[53] Until recently, most attorneys relied upon the judgment and good faith of counsel asserting a privilege; today, opposing counsel is more likely to press for a judicial determination.[54] Counsel commonly asks for a list of all responsive documents that a party has withheld on the basis of privilege. The list typically identifies each document by author, recipient, date, and subject matter and states the basis for the claim of privilege.[55] Courts have even used the term *Vaughn* index to describe these lists when prepared by the government.[56] Private practitioners complain, especially with respect to documents covered by the attorney-client privilege, that the lists disclose information (*e.g.*, the subject matter of the document) which the privilege ought to protect.[57]

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review of agency withholdings. *See, e.g., Stein*, 662 F.2d at 1252. Requesters who, like the courts, have had no opportunity to review the withheld records are concerned by the courts' ready acceptance of agency justifications. *See* Lively, *Catch 7(A): The Plaintiff's Burden Under the Freedom of Information Act*, 28 VILL. L. REV. 75 (1982-83).

[49] The *Stein* court, for example, described its role as one of "judicial review," apparently ignoring the de novo review requirement of 5 U.S.C. § 552(a)(4)(B) (1982). 662 F.2d at 1252.

[50] *See, e.g., Military Audit Project*, 656 F.2d at 738; Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980).

[51] *See* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 239 (1978).

[52] *See* Nix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978).

[53] *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 97 F.R.D. 427, 434 (E.D.N.Y. 1983) (deliberative process privilege); United States v. AT&T, 86 F.R.D. 603, 608 (D.D.C. 1979) (Special Masters' Guidelines for the Resolution of Privilege Claims); United States v. Pfizer, Inc., 560 F.2d 326, 336 n.20 (8th Cir. 1977) (work product privilege); Black v. Sheraton Corp. of Am., 564 F.2d 531, 543 (D.C. Cir. 1977) (law enforcement evidentiary privilege).

[54] *See* Davidson, *Judicial Procedures for Resolving Claims of Privilege*, 8 LITIGATION, Summer, 1982, at 36.

[55] *Id.* at 37.

[56] *See, e.g.*, *Black*, 564 F.2d at 544-45. The court nevertheless held that the government was entitled to an in camera inspection of the documents before it could be ordered to produce them. *Id.* at 545.

[57] Davidson, *supra* note 54, at 36.

The availability of in camera review, however, substantially lessens the government's burden of justifying the withholding of a document and shifts to the court much of the burden of reviewing withheld documents. In the "Agent Orange" litigation, for example, Judge Pratt required the government to submit an affidavit describing in general terms any documents claimed to be privileged, why a privilege applied, and the harm which would result from disclosure.[58] He also required the government to make the documents available for in camera inspection. The court explicitly recognized that automatic in camera inspection lessens the government's burden because its affidavits can then be less detailed.[59] The court can better manage the burden of review in discovery because the judge or master is more likely to be familiar with the subject matter of the documents. In addition, the discovery court has a greater need to assume the burden because, unlike a FOIA court, it often must determine whether a party's need for a document outweighs the government's interest in confidentiality. In camera review thus benefits both the government[60] and the discovery court and makes it procedurally easier to withhold documents in discovery than under the FOIA.

Another factor facilitating the release of agency records is the highly decentralized nature of most agency FOIA operations. To permit the more efficient release of agency records, agency regulations normally require that a FOIA requester submit her request to the office where the requested records are located—in most cases a regional or local office.[61] Public information officers in these offices, despite their lack of legal training, may release nonexempt records. On the other hand, the denial of a request is a legal matter which requires the advice of an attorney. The Department of the Air Force, for example, authorizes hundreds of public information officers around the world to grant FOIA requests but permits only thirty-two persons, acting on the advice of counsel, to deny them. Of course, if an agency knows that a particular custodian is responsible for a considerable number of records likely to contain exempt matter, such as proprietary information (exemption b(4)) or classified information (exemption b(1)), the agency may institute tighter controls over the release decision.

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[58] *In re* "Agent Orange" Prod. Liab. Litig., 97 F.R.D. at 429-30.

[59] *Id.* at 430.

[60] Government attorneys do not always view in camera proceedings in such rosy terms. They often prefer to describe sensitive documents for a judge rather than to permit the judge to read the documents himself because they fear that a judge who reviews the documents personally may too readily conclude that there is no harm in disclosing them.

[61] Requests to an agency's national or Washington office form a very small portion of most agencies' FOIA workload.

Predictably, agencies employ a standard routine for processing FOIA requests. Upon the receipt of a FOIA request, the agency's public information office searches for the responsive records and then reviews them to determine whether they are exempt. (The paper flow is staggering; the Act could not have been implemented prior to the advent of photocopying machines.) If the records appear to be connected with litigation, the public information officer normally contacts the lawyers representing the agency in the matter. Although the agency's litigators rarely have authority to deny FOIA requests,[62] agencies accord great weight to their views on what records are exempt.

Government litigators fear that a release of exempt records will occur through inadvertence, inability to comply with the statutory time limits, or failure to present to the reviewing court an adequate justification for withholding. The latter two fears are largely unjustified because the courts have been excessively indulgent with agencies that miss statutory time limits[63] or that fail initially to justify the withholding of exempt records.[64] Individual district court judges sometimes are not so patient; but there is little evidence that agencies have been forced to release exempt records because of an inadequate opportunity to justify withholding them.[65] Government lawyers mostly complain about the double burden of protecting sensitive litigation files from discovery and FOIA requests and about FOIA releases made without consulting them.

In addition to the disadvantages of the intricate system for responding to FOIA requests, the lack of any reasonableness or relevancy limitations on FOIA requests burdens the government. In discovery, a judge or umpire is available to protect the government from unreasonably burdensome requests, and the rules limit discovery to relevant documents. Under the FOIA, however, the requester need only "reasonably describe" the records he wants.

Despite the lack of any clearly drawn limits, the courts have interpreted this "reasonable description" requirement to provide some protection to agencies. The requester's description of the record must enable "a professional employee of the agency who [is] familiar with the subject area of the request to locate the record with a reasonable amount of effort."[66] If the description coincides with a category of documents previously identified by the agency, it must search for the documents through its established indexing and retrieval systems.[67] But if the agency has not segregated its records in accordance with the description, it need only make a reasonable search; it is not required to reorganize its filing system in response to a FOIA request.[68] For example, an agency need not conduct a page-by-page search of its files to uncover records that served as preparatory documents for congressional testimony[69] or that support a particular proposition (*e.g.*, the safety of a product).[70]

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[62] Among the agencies contacted, only the FTC authorizes agency litigators to deny FOIA requests. At the Commission, the Bureau Director or regional office responsible for an investigation may deny access to an open investigatory file. 16 C.F.R. § 4.11(a)(1)(iv)(B) (1983). Appeals from these initial denials are to the General Counsel.

[63] *See, e.g.*, Open Am. v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976) (large volume of requests an "exceptional circumstance" under 5 U.S.C. § 552(a)(6)(C)(1982) for allowing an agency additional time to respond). To avoid the statutory time limits, the agency need only show that it is processing a backlog of requests with due diligence on a first-in, first-out basis. *Id.* at 616.

[64] *See, e.g.*, Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969 (3rd Cir. 1981) (agency granted a second chance to prepare an adequate *Vaughn* index).

[65] However, in the *Coastal States* litigation, the Department of Energy did release a substantial number of records under the district court's order before the court of appeals reversed and gave the agency more time to establish the exempt status of the records. *See id.*

Courts also have held that an agency may limit its search to the office where the requester submitted the FOIA request and that an agency need not search its files nationwide simply because a requester chose to file with the national office.[71] Nothing prevents a requester, however, from filing multiple requests at different offices or from specifying that he wants a nationwide search. While an agency may refuse to conduct a burdensome FOIA search if it is highly unlikely to produce any responsive documents,[72] it may not decline a search on the grounds that it is likely to produce an unreasonably large number of responsive documents. In the latter situation, the agency can do no more than tell the requester that the search may take time and be costly. If the requester is seeking the records primarily for use in litigation (a quintessentially "private" purpose), the agency normally may charge its search and duplication costs.[73] Most litigant requesters do not have unlimited time or money and are therefore willing to narrow their requests, but such negotiations provide less protection for the agency than would a neutral judge, especially if the litigant has substantial financial resources.

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[66] Goland v. CIA, 607 F.2d 339, 353 n.88 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1981).

[67] *Id.*

[68] *Id.* at 369-70 (opinion on rehearing); *see also* National Cable Television Ass'n. v. FCC, 479 F.2d 183, 192 (D.C. Cir. 1973). The *National Cable* opinion interpreted the pre-1974 requirement that the requester "reasonably identify" the records it wished the agency to release. *Goland* followed *National Cable* in interpreting the "reasonably describe" requirement found in the present Act. *Goland*, 607 F.2d at 353 n.88 (initial panel opinion).

[69] *See Goland*, 607 F.2d at 353.

[70] *See* Bristol-Myers Co. v. FTC, 424 F.2d 935, 938 n.8 (D.C. Cir. 1970) (dictum).

[71] *See, e.g.*, Marks v. Department of Justice, 578 F.2d 261, 263 (9th Cir. 1978); Clinchfield Coal Corp. v. Donovan, 3 GOV'T DISCLOSURE SERV. ¶ 82,251 (D.D.C. 1982).

[72] *See* Weisberg v. Department of Justice, 705 F.2d 1344, 1357 (D.C. Cir. 1983) (search of FBI's Dallas office would be "fruitless and unreasonable"); Shaw v. NSA, 3 GOV'T DISCLOSURE SERV. ¶ 83,196 (D.D.C. 1983). *Weisberg* reaffirms earlier decisions that a FOIA search must be reasonably calculated to uncover all responsive documents. *See, e.g.*, Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (per curiam).

B. Production of Documents Under Rule 34

The Federal Rules of Civil Procedure facilitate document discovery between parties to litigation and protect the parties (including the government when it enjoys party status) from unreasonable discovery requests. Rule 34 permits a party to request any other party to produce for inspection and copying any designated, relevant, and unprivileged documents.[74] The request may be served upon the plaintiff after the commencement of the action, and upon any other party with or after service of the summons and complaint.[75] The request must specify a reasonable time, place, and manner for the inspection.[76] Rule 34 thus leaves the timing of document production to the parties, subject to court supervision. The rule only requires a party to respond within 30 days after service of the request (or, in the case of a defendant, within 45 days after service of the summons and complaint) by indicating whether he will comply or object.[77] Of course, if a party objects to a request, or fails to respond or to permit inspection, the discovering party may move for a Rule 37(a) order to compel production.[78]

Under Rule 34, the discovering party must describe the documents (by item or category) with "reasonable particularity."[79] The designation requirement permits a party to obtain a more thorough search and more useful information than under the FOIA. The description need only be "sufficient to apprise a man of ordinary intelligence what documents are required" and to permit the court "to ascertain whether the requested documents have been produced."[80] Thus, the requester may assume that the responding party has a "brain" and that, once put on notice of the documents requested, he will find them even if his indexing or retrieval system does not coincide with the requester's categorization. A court may limit, however, a discovery search to those files that potentially contain enough relevant information to warrant searching them.[81]

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[73] Dorta v. FBI, 3 Gov't Disclosure Serv. ¶ 82,349 (D.D.C. 1982). 5 U.S.C. § 552(a)(4)(A)(1982) authorizes the agency to waive or reduce its customary charges for document search and duplication if the agency determines that furnishing the information can be considered as "primarily benefiting the general public." The agency's denial of a fee waiver request is reviewable for arbitrariness and capriciousness. Eudey v. CIA, 478 F. Supp. 1175, 1176 (D.D.C. 1979).

[74] Fed. R. Civ. P. 34(a).

[75] *Id.* at 34(b).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] 8 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2211, at n.86 (1970)(citing cases).

The designation requirement of Rule 34 favors the discovering party in other ways. It permits a party to request all documents relevant to an incident or product, or all the documents an opponent will use to establish a proposition. These discovery requests[82] are useful in limiting an opposing party's proof at trial or hearing. They are also likely to generate more intensive searches than would a FOIA request, because an agency may not limit a discovery search to its established indexing and retrieval systems. Documents produced in discovery are then admissible at trial without additional authentication. The availability of interrogatories and depositions also makes it easier to obtain further discovery on the existence of relevant documents. Although a FOIA requester may, by suing to enjoin the withholding of records, obtain discovery on the sufficiency of a FOIA search, the district court is likely to grant summary judgment to the government on this issue if the agency affidavits describing its search are detailed, nonconclusory, and in good faith.[83]

Rule 34 has other advantages for the discovering party. First, discovery is normally free,[84] while FOIA requesters seeking records for litigation purposes rarely obtain fee waivers. Second, a party may obtain litigation related sanctions if an agency fails to provide discovery ordered by the court[85] or even if it successfully invokes a claim of privilege.[86] The sanctions available under the FOIA (*e.g.*, the disciplining of agency employees who arbitrarily withhold records[87]) are not as useful to parties in litigation. Third, a party who prevails in litigation with the government may recover attorney's fees attributable to the government's failure, without substantial justification, to provide discovery that was ordered by the court or requested by the party.[88] A victorious complainant in a FOIA suit who sought records for discovery purposes rarely obtains attorney's fees because his entitlement to an award depends upon a balancing of four factors, one of which is the public benefit (as opposed to a litigation or other private benefit) that results from the release of the records.[89] Finally, a party may obtain relevant documents under Rule 34 that are exempt under the FOIA. An agency cannot base a claim of privilege on a FOIA exemption,[90] even though a court may consider the congressional policies underlying the FOIA exemption when considering the claim of privilege.[91] Thus, exempt documents may be discoverable under Rule 34 either because the discovery privilege is narrower than the corresponding FOIA exemption[92] or because, as is more likely, the party's need for the document overrides the government's privilege.

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[81] *See* United States v. Exxon Corp., 87 F.R.D. 624, 634 (D.D.C. 1980).

[82] Such commonplace discovery requests are not proper FOIA requests. For a discussion of the FOIA requirement that the requester must "reasonably describe" the requested records, see *supra* text accompanying notes 67-70.

[83] *See, e.g.*, Perry v. Block, 684 F.2d 121, 126 (D.C. Cir. 1982) (per curiam); Goland v. CIA, 607 F.2d 339, 352 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1981); Founding Church of Scientology v. NSA, 610 F.2d 824, 836 (D.C. Cir. 1979).

[84] A basic premise underlying the liberal discovery provisions of the federal civil rules is that the burden of complying with discovery requests is an incident of litigation. Each party therefore bears his own search and production costs. Sherman & Kinnard, *Federal Court Discovery in the '80's—Making the Rules Work*, 95 F.R.D. 245, 248 (1982).

[85] *See, e.g.*, *In re* Att'y Gen. of the United States, 596 F.2d 58, 65 (2d Cir. 1979).

[86] If the government chooses to withhold relevant but privileged information, a court may impose litigation related sanctions. *See*, *e.g.*, Liuzzo v. United States, 508 F. Supp. 923, 940 (E.D. Mich. 1981) (finding of liability in tort suit against United States); United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944) (dismissal of indictment).

[87] 5 U.S.C. 552(a)(4)(F) (1982).

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[88] Section 204(b) of the Small Business Export Expansion Act of 1980, Pub. L. No. 96-481, § 204(b), 1980 U.S. CODE CONG. & AD. NEWS (94 Stat.) 2321, 2328, provides that the United States shall be liable for costs and expenses, including attorney's fees, to the prevailing party in any civil action to the extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award. See 28 U.S.C. § 2412(b)(1982) for the codification of this provision, which is part of what is commonly referred to as the Equal Access to Justice Act. The Department of Justice apparently concedes that Rule 37 is a qualifying statute but insists that a private party may recover attorney's fees for discovery matters only if he is entitled to them under Rule 37 *and* if he prevails in the underlying litigation. OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE, AWARD OF ATTORNEY'S FEES AND OTHER EXPENSES IN JUDICIAL PROCEEDINGS UNDER THE EQUAL ACCESS TO JUSTICE ACT 29, 57 (undated). The Supreme Court similarly interpreted the prevailing party requirement of the Civil Rights Attorney's Fees Awards Act of 1976. Hanrahan v. Hampton, 446 U.S. 754 (1980).

[89] The four factors that the FOIA court must weigh in determining a prevailing complainant's entitlement to attorney's fees under 5 U.S.C. § 552(a)(4)(E) (1982) are: 1) the public benefit derived from the release; 2) the commercial benefit to the requester; 3) the nature of the requester's interest in the records sought; and 4) whether the government's withholding had a reasonable basis in law. S. REP. NO. 854, 93rd Cong., 2d Sess. 19 (1974). These factors are not exhaustive, but the court must consider them. *E.g.*, Church of Scientology v. United States Postal Serv., 700 F.2d 486, 492 (9th Cir. 1983); Cox v. Department of Justice, 601 F.2d 1, 7 (D.C. Cir. 1979). In denying awards courts have reasoned that complainants who are using the FOIA for discovery purposes already have sufficient incentives for pursuing their judicial remedies under the FOIA. *See, e.g.*, Guam Contractors Ass'n v. Department of Labor, 3 GOV'T DISCLOSURE SERV. ¶ 83,174 (N.D. Calif. 1983). In rare cases, the public interest in the disclosure of the records, or the lack of any reasonable basis to support the government's withholding, may result in an award of attorney's fees even though the complainant seeks the records for discovery purposes. *See, e.g.*, Cazalas v. Department of Justice, 709 F.2d 1051 (5th Cir. 1983) (employment records sought by potential title VII plaintiff).

[90] *See* Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593, 597 (E.D. Pa. 1980); Canal Auth. v. Froehlke, 81 F.R.D. 609, 612 (M.D. Fla. 1979), *noted in* Note, Canal Authority of Florida v. Froehlke: *The Freedom of Information Act Exemptions Provide No Bar to Discovery*, 11 ENVTL. L. REV. 435, *passim* (1980); Kinoy v. Mitchell, 67 F.R.D. 1, 12 n.41 (S.D.N.Y. 1975); Pleasant Hill Bank v. United States, 58 F.R.D. 97, 99 (W.D. Mo. 1973).

[91] *See* Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the*

The qualified scope of the privileges available to the government—the official information, the informer's, and the law enforcement evidentiary privileges—permit a party, upon a showing of need, to obtain more relevant documents in discovery than under the FOIA.[93] The official information privilege provides the clearest case. In enacting exemption 5, Congress intended to afford FOIA requesters the same access to deliberative material and work product as was routinely available in discovery.[94] Discovery courts nevertheless have allowed parties, upon a showing of litigation need, to obtain agency records containing deliberative matter previously found to be exempt under the FOIA.[95] A showing of a case-specific need therefore can entitle a party to greater access to agency records than that "routinely" available to parties in litigation with the agency, and thus also greater than that available to the public under the FOIA.[96]

The scope of the law enforcement evidentiary privilege is less certain. Courts have interpreted the privilege to cover all investigatory files

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Federal Discovery Rules, 49 GEO. WASH. L. REV. 843, 852 (1981) (citing cases holding that a court may consider the legislative intent underlying the FOIA exemption).

[92] In *Canal Authority*, for example, the court held that confidential business information in an appendix to an agency's environmental impact statement (presumably covered by FOIA exemption b(4)) was not privileged in discovery in the absence of some statutory basis for the claim of privilege. It also held that the court ordered disclosure did not violate the Trade Secrets Act, 18 U.S.C. § 1905 (1982), because the disclosure was authorized by law (*i.e.*, by FED. R. CIV. P. 26(b)). *Canal Authority*, 81 F.R.D. at 611. The court did express willingness to enter a protective order upon an appropriate showing. *Id.*

[93] *See* Association for Women in Science v. Califano, 566 F.2d 339 (D.C. Cir. 1977) (providing a general discussion of these qualified privileges).

The state secrets privilege is an exception because it is absolute. A party's need for discovery affects only the court's scrutiny of the government's claim of a state secrets privilege; the more a party does to establish his need for the information, the more closely a court must scrutinize the government's claim of privilege. *See* United States v. Reynolds, 345 U.S. 1, 11 (1953); Halkin v. Helms, 690 F.2d 977, 990 (D.C. Cir. 1982).

[94] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148-49 (1975); EPA v. Mink, 410 U.S. 73, 85-86 (1973). Given the ambiguity of the reference in H. REP. NO. 1497, 89th Cong., 2d Sess. 10, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2418, 2428 to "routinely discoverable" (under which discovery rules?), courts interpret exemption 5 to cover only deliberative material produced in the process of making agency decisions—not factual material or agency law. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 405 (2d ed. 1978).

[95] *E.g.*, United States v. Exxon Corp., 4 ENERGY MGMT. (CCH) ¶ 26,350 (D.D.C. 1982) (discovery court applied FOIA standards to determine what documents were exempt and thus privileged from disclosure absent some showing of need).

[96] McClelland v. Andrus, 606 F.2d 1278, 1287 n.54 (D.C. Cir. 1979) (uniquely relevant internal report may be discoverable although exempt from release under the FOIA).

(other than those containing information on governmental wrongdoing) the release of which might impede law enforcement.[97] If this interpretation is accurate, the privilege is broader than the corresponding FOIA exemption b(7), which only protects investigatory records when disclosure would cause one of six specific harms.[98] And it would seem that fewer documents would be available in discovery. But, as a practical matter, a party's access to investigatory files in discovery is at least as great as that of a FOIA requester. Parties primarily seek discovery of agency investigatory files in tort suits which involve claims of wrongdoing or closed files whose release would not impede law enforcement. Furthermore, while parties in both tort[99] and judicial enforcement actions[100] have only limited access in civil discovery to open investigatory files, a FOIA requester's access is no greater because exemption b(7)(A) generally precludes access to investigatory records in pending proceedings until those records would be available through discovery.[101]

A party seeking documents that contain the names of confidential sources is also more likely to obtain the document through discovery than by using the FOIA. FOIA exemption b(7)(D) affords absolute protection to records that would disclose a confidential source if released, while the informer's privilege affords only qualified protection.[102] Further, upon a showing of need, tort plaintiffs may obtain investigatory reports without the redactions that would be made to protect the personal privacy of informants, witnesses, or law enforcement officers when an agency releases the same documents under the FOIA (exemption b(7)(C)).[103]

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[97] *See, e.g.*, Black v. Sheraton Corp. of Am., 564 F.2d 531, 545-46 (D.C. Cir. 1977) (closed investigatory files may be privileged if disclosure would tend to reveal law enforcement techniques or sources); Machin v. Zuckert, 316 F.2d 336, 339 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963) (investigative report privileged if disclosure would hamper efficient operation of important government program).

[98] 5 U.S.C. 552(b)(7)(A)-(F) (1982).

[99] *E.g.*, Swanner v. United States, 406 F.2d 716, 719 (5th Cir. 1969) (no abuse of discretion for trial court to deny tort plaintiff access to open investigatory file). *But cf.* Brown v. Thompson, 430 F.2d 1214, 1216-1217 (5th Cir. 1970) (dismissing a tort plaintiff's complaint with prejudice for lack of proof may be an abuse of discretion if a privileged active file eventually may become discoverable).

[100] The government must provide discovery of the evidence it anticipates using at trial, but the remainder of the open file, with the exception of exculpatory and *Jencks* material, may constitute privileged work product. *See* J.H. Rutter Rex Mfg. Co. v. NLRB, 473 F.2d 223, 234 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973).

[101] NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 232 (1978).

[102] *See In re* United States, 565 F.2d 19, 22-23 (2d Cir. 1977), *cert. denied*, 436 U.S. 962 (1978) (tort suit); Wirtz v. Continental Fin. & Loan Co., 326 F.2d 561, 563-64 (5th Cir. 1964) (enforcement proceeding).

[103] *See* Frankenhauser v. Rizzo, 59 F.R.D. 339, 345 (E.D. Pa. 1973); Note, *Discovery of Government Documents and the Official Information Privilege*, 76 COLUM. L. REV. 142, 157-62

Many government lawyers fear that allowing the use of the FOIA for discovery purposes will undermine many of the protections that discovery provides. A party's access to government documents under Rule 34, although quite broad, is subject to several constraints. A request must be timely and the documents must be relevant to the litigation; in addition, the Supreme Court has amended the civil rules to impose further limitations to prevent discovery abuse. Discovery abuses fall into two categories,[104] both largely attributable to excessive adversariness by attorneys.[105] First, parties engage in discovery avoidance through delay, obfuscation, and other strategems. Judges are reluctant to impose sanctions even for direct violations of the discovery rules because they do not want to become involved and do not want to punish the client for the faults of the attorney.[106] Second, parties zealously overuse discovery, although there is considerable controversy over whether this problem is pervasive or limited to "big" cases.[107] Seeking to win a case through discovery, lawyers sometimes make redundant or excessive requests.[108] A variant of these abuses occurs when a responding party "dumps" a huge mass of disorganized documents on the requester.[109] The amended discovery rules respond to these abuses by increasing judicial control over discovery, and thus abandoning the prior philosophy that the rules should be "designed to encourage extrajudicial discovery with a minimum of judicial intervention."[110]

The new discovery rules build upon the experience acquired by judges trying cases under local rules of court[111] and under the case management approach recommended by the *Manual for Complex Litigation*.[112] Rule 26(f), added in 1980, authorizes the trial court to hold a discovery conference to identify issues and to establish plans, schedules, and limi-

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(1976). For a FOIA case describing the redactions permissible under the FOIA but not in discovery, see Nix v. United States, 572 F.2d 998, 1001-06 (4th Cir. 1978).

[104] *See* Sherman & Kinnard, *supra* note 84, at 246.

[105] *See* Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978).

[106] *See* Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 273-74 (1979).

[107] *See* Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 812-13 (1981).

[108] *See* Rosenberg, *Discovery Abuse*, 7 LITIGATION, Spring, 1981, at 8.

[109] *See* Pope, *Rule 34: Controlling the Paper Avalanche*, 7 LITIGATION, Spring, 1981, at 28.

[110] Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, Advisory Committee's Explanatory Statement Concerning Amendments to the Discovery Rules, 48 F.R.D. 485, 488 (1970).

[111] *See* Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981).

[112] *See* MANUAL FOR COMPLEX LITIGATION § 1.10 (1981) (supplement to C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1982)).

tations applicable to discovery. The rule only requires the court to hold a conference if an attorney shows that he has made reasonable efforts to agree on these matters with opposing counsel. The draftsmen of Rule 26(f) thus did not contemplate that discovery conferences would become routine.[113] But in 1983, the Court amended Rule 16[114] to require the trial court to enter a scheduling order (containing time limits for the completion of discovery) within 90 days of the filing of a complaint in all actions not exempted by a district court rule.[115] The amendment's elaborate provisions for pretrial conferences and orders further encourage judicial control.[116]

The 1983 amendments to Rule 26 also augment judicial control by requiring the trial court to limit discovery if it is "unreasonably cumulative or duplicative" or is "unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake."[117] The judicially fashioned discovery plan should include, in all but the simplest cases, strict time limits and simultaneous discovery in separate waves. After a first wave limited to discovery of sources of information (*i.e.*, the names of witnesses and the existence, location, and names of custodians of discoverable documents), successive waves of discovery should follow on the merits and on any special issues raised by the litigation.[118] Trial judges, when determining what constitutes "redundant" or "excessive" discovery, must consider the importance of the case. Although it is uncertain whether judges have the capacity or fortitude to enforce the results of such a balancing test,[119] the government may now resist the production of relevant documents on the ground that the requests are cumulative or excessively burdensome given the importance of the case. Closing discovery in this fashion would encourage litigants to use the FOIA.

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[113] Advisory Committee Notes to 1980 Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 524, 526-27 (1980).

[114] FED. R. CIV. P. 16(b) (effective August 1, 1983). For the text of the amended rule, see 97 F.R.D. 165, 168-69 (1983).

[115] FED. R. CIV. P. 16(b)(3).

[116] *Id.* at 16(c)-(e).

[117] *Id.* at 26(b)(1). The 1983 amendments also repealed the final sentence in former Rule 26(a), which left the frequency of discovery to the judgment of the parties, subject only to the court's authority to issue a protective order.

[118] *See* MANUAL FOR COMPLEX LEGISLATION, *supra* note 112, at § 0.50.

[119] Because the optimal level of discovery will vary from case to case, there are no absolute boundaries. In the abstract, the limitations can only be said to be analogous to, but narrower than, the former relevancy limitations. *See* Sherman & Kinnard, *supra* note 84, at 280. In drafting the 1980 amendments, the Advisory Committee on the Civil Rules rejected a proposal that would have limited discovery in civil actions to any unprivileged matter relevant to a claim or defense of any party to the proceeding. *Id.* at 247 n.7.

C. Production of Documents Under Rule 45

Although Rule 34 only applies to discovery from a party, Rule 45 of the Federal Rules of Civil Procedure permits a party to discover documents from a person who is not a party. To obtain agency records under this rule, the party serves a notice to take the deposition of the agency employee who has possession or control of the records and then serves a subpoena on the deponent to produce the documents.[120] Because Rule 34 only requires the production of documents in the possession, custody, or control of a party,[121] Rule 45 is the only discovery device available for obtaining agency records in private litigation and in government litigation to which the agency possessing the desired records is not a party. With respect to the latter category of cases, the courts rarely address the status of an agency not named as a party when the United States or another agency is a named party. Private litigants frequently ask Department of Justice lawyers to produce documents generated by agencies that are not named parties. If these requests are sufficiently specific, the Department usually does not limit its search to its own or client agencies' files, but makes reasonable efforts to produce documents from throughout the government.

These discovery requests raise legal and practical problems. If only the United States or agency A is a named party, it is often unclear whether the records of agency B are within the possession, custody or control of the named party, and thus discoverable under Rule 34. In the leading case on this issue, the District Court for the District of Columbia held, in *United States v. AT&T*,[122] that all executive branch agencies were party plaintiffs in an antitrust suit bought by the United States.[123] The court reasoned that unencumbered discovery under Rule 34 was appropriate against executive branch agencies because the government's allegations were wide-ranging and many agencies had participated in the policy formulation that led to the lawsuit.[124]

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[120] *See* FED. R. CIV. P. 45(d)(1). The party may also subpoena the agency custodian to produce documentary evidence at a hearing or trial. *See id.* at 45(b). Subpoenas returnable at a deposition, on the other hand, are not limited to documentary evidence but may obtain the production of documents containing matters within the scope of the discovery rules. *See id.* at 45(d)(1). Most state courts have adopted a comparable rule. Because the federal government is rarely a party to civil actions in the state courts, parties in state court litigation normally will seek discovery of agency records under rules similar to Rule 45.

[121] *See id.* at 34(a).

[122] 461 F. Supp. 1314 (D.D.C. 1978).

[123] *Id.* at 1334.

[124] *Id.*

The narrowness of the *AT&T* court's holding[125] confirms the uncertainty in other government litigation surrounding the status of agencies not named as parties. In some situations, agency B plainly is not a party within the meaning of Rule 34. The *AT&T* court itself held that independent agencies, such as the FCC, are not party plaintiffs in antitrust suits brought by the United States because the records of those agencies are beyond the control of the executive branch.[126] Thus, although private parties may rely on the voluntary efforts of government counsel to obtain records from agencies who may not be parties, one may wonder whether this search will be as thorough as it would be if the agency were directly served with a discovery request. Rule 45 allows such a request, as does the FOIA.

The scope of discovery is the same under Rule 45 and Rule 34, but Rule 45 procedures are more cumbersome. A party may serve a Rule 34 request on an opposing party through his counsel.[127] Under Rule 45, on the other hand, the party must identify, subpoena, and depose the agency official who possesses or controls the records.[128] While parties normally do not charge each other fees under Rule 34,[129] Rule 45(b) authorizes a court to condition document discovery from a nonparty on the discovering party's advancement of reasonable costs.[130] Finally, contempt, the only sanction available for failure to provide discovery under Rule 45,[131] is not likely to be effective against agency officials, especially high-ranking ones.[132]

Agency housekeeping regulations also apply to Rule 45 and state court subpoenas. The Housekeeping Statute[133] authorizes agencies to prescribe regulations for the custody, use, and preservation of agency records. Although a 1958 amendment states that the statute does not authorize "withholding information from the public or limiting the availability of records to the public,"[134] it did not disturb agency regulations which instruct employees not to testify or to produce documents without the permission of their superiors.[135] Those regulations normally require document custodians to bring subpoenas to the attention of the general counsel or other agency official and then to await instructions.[136] Some housekeeping regulations permit the custodian to release records disclosable under the FOIA on his own authority.[137] Others require the discovering party to submit a summary of the information sought and its relevance to the pending proceeding.[138] A few agencies will produce documents without a subpoena; they expect the party's lawyer to establish the relevance of the records by supplying the pleadings or other information about the pending proceeding.[139] All of the agencies contacted expressed a willingness to help private litigants by releasing as much information as they could. Normally, an agency will negotiate a reasonable accommodation for producing its records, under a protective order if necessary, to avoid the need for agency employees to appear and give testimony. No doubt this informal approach makes the disclosure of records in the hands of nonparty agencies less cumbersome than it might be, but if an agency resists disclosure the discovering party must proceed under the inhospitable provisions of Rule 45.

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[125] On the narrowness of the *AT&T* court's holding, see Trane Co. v. Klutznick, 87 F.R.D. 473, 475 (W.D. Wis. 1980).

[126] *AT&T*, 461 F. Supp. at 1335-37.

[127] *See* FED. R. CIV. P. 5(b).

[128] *See id.* at 45(d).

[129] *See supra* note 84.

[130] *See* FED. R. CIV. P. 45(b).

[131] *See id.* at 45(f).

[132] *See* 4 MOORE'S FEDERAL PRACTICE § 26.61 [5.-1] (2d ed. 1982). The agency may invoke a housekeeping regulation to vest in the agency head or other high-level official the decision whether to produce a subpoenaed document.

[133] 5 U.S.C. § 301 (1982).

[134] Act of Aug. 12, 1958, Pub. L. No. 85-619, 1958 U.S. CODE CONG. & AD. NEWS (72 Stat.) 547.

D. Disclosure Under the Federal Rules of Criminal Procedure

Federal Rule of Criminal Procedure 16(a)(1)(C) requires the government to disclose, upon the request of a criminal defendant, all documents and tangible objects in the possession, custody, or control of the government "which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant." Major problems associated with this rule include both the overdisclosure and underdisclosure of documents.

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[135] *See* 4 MOORE'S FEDERAL PRACTICE. *supra* note 132, at §26.61 [4.-2]. For pre-1958 decisions upholding housekeeping regulations and overturning sanctions imposed on agency custodians who refused to produce subpoenaed documents without the permission of their superiors, see United States *ex rel*. Touhy v. Ragen, 340 U.S. 462 (1951); Boske v. Comingore, 177 U.S. 459 (1900).

[136] *See, e.g.*, 16 C.F.R. § 4.11(e) (1983) (FTC). None of the agencies contacted require, as the cases cited *supra*, note 135, seemingly permit, that the discovering party serve a subpoena on the agency head rather than on a lower level custodian, whom a party often may find more convenient to serve. But for a case where an agency did use a housekeeping regulation to bar the production of nonprivileged documents solely because the discovering party subpoenaed a subordinate agency employee rather than the agency head, see United States Steel Corp. v. Mattingly, 89 F.R.D. 301, 302 (D. Colo.), *rev'd*, No. 80-1647 (10th Cir. Aug. 12, 1980), *cert. denied*, 450 U.S. 980 (1981), discussed in Lively, *Government Housekeeping Authority: Bureaucratic Privileges with a Bureaucratic Privilege*, 16 HARV. C.R.-C.L. L. REV. 495, 502-11 (1981).

[137] 7 C.F.R. § 1.15 (1983) (Department of Agriculture); 43 C.F.R. § 2.80 (1982) (Department of the Interior).

[138] 28 C.F.R. § 16.22(d) (1982) (Department of Justice)(summary mandatory); 29 C.F.R. § 2.21 (1982) (Department of Labor) (departmental officials may waive summary).

[139] For example, this is the practice in the Office of the Comptroller of the Currency in the Department of the Treasury and at the Federal Reserve Board.

The first problem resembles that posed by the "boxcar" production of documents under Rule 34 of the Federal Rules of Civil Procedure, but it is aggravated in criminal cases by the absence of pretrial mechanisms (*e.g.*, interrogatories or requests for admissions) for narrowing the issues. In complex cases, the government often discloses a mass of documents which the defendant, on account of the Speedy Trial Act,[140] has only 60 to 90 days to review.[141] The defendant's efforts to extract useful information from the documents may be hampered by the absence of a "road map" to the government's case and by the government's unwillingness to identify which documents will serve as its exhibits (*i.e.*, the government discloses the documents *from which* its exhibits will be chosen).[142] Although the defendant may obtain a substantial number of documents, the inability to identify before trial the factual issues in dispute makes the disclosure less useful.

The second problem arises when the defendant requests documents for his own defense that are not part of the government's case-in-chief and which it claims are not "material." The rule does not define that term, and a number of recent cases indicate that it covers little more than exculpatory material that the prosecutor must disclose anyway under the *Brady* doctrine.[143] Another line of cases interprets "material" more broadly to require the government to disclose all requested documents relevant to an asserted defense.[144]

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[140] 18 U.S.C. §§ 3161-3174 (1982).

[141] 18 U.S.C. § 3161 requires the prosecutor to bring the defendant to trial within this time period.

[142] Obermaier, *Special Aspects of Litigating White-Collar Criminal Cases*, 6 LITIGATION, Spring, 1980, at 12; Doramus, *The White Collar Chafes: Looking for Evidence after Indictment*, 6 LITIGATION, Spring, 1980, at 16. For a case holding that the government complied with FED. R. CRIM. P. 16(a)(1)(C) when it disclosed its entire case file without designating its exhibits, see United States v. Marino, 639 F.2d 882, 889 (2d Cir. 1981), *cert. denied*, 454 U.S. 825 (1982) (documents disclosed did not exceed capacity of attorney to read and study in preparation for a major trial).

[143] These cases hold that a document is material under FED. R. CRIM. P. 16(a)(1)(C) only if its disclosure would have significantly altered the quantum of proof in the defendant's favor. *E.g.*, United States v. Rhoads, 617 F.2d 1313, 1319 (8th Cir. 1980); United States v. Orzechowski, 547 F.2d 978, 984, (7th Cir. 1977), *cert. denied*, 431 U.S. 906 (1979); United States v. Marshall, 532 F.2d 1279, 1285 (9th Cir. 1976); Ross v. United States, 511 F.2d 757, 762-63 (5th Cir. 1973), *cert. denied*, 423 U.S. 836 (1975).

[144] *E.g.*, United States v. Felt, 491 F. Supp. 179, 186 (D.D.C. 1979); United States v. Leichtfuss, 331 F. Supp. 723 (N.D. Ill. 1971); United States v. Tanner, 279 F. Supp. 457, 469-470 (N.D. Ill. 1967). For an argument that these cases properly interpret FED. R. CRIM. P. 16 and that *Ross* and its progeny are in error, see Reznick, *Pretrial Discovery in the Federal Courts*, in 1A CRIMINAL DEFENSE TECHNIQUES § 10.01[5] (1983).

Under the narrow interpretation of Rule 16, the government need not disclose relevant documents (*i.e.*, ones that might lead to admissible evidence) that are available to the public under the FOIA.[145] This anamoly led the trial court in *United States v. Brown*[146] to order the government to produce relevant documents releasable under the FOIA, even though the defendant had not made FOIA requests to the agencies with custody of the records.[147] This approach is satisfactory when the defendant seeks a discrete number of arguably relevant documents, but a defendant should not be allowed to delay trial by obtaining massive FOIA-like searches that are unlikely to produce relevant material and that require the processing of voluminous, and often exempt, documents.[148]

The difference between the two interpretations of Rule 16's materiality requirement may be more apparent than real, however, because there is no judicial supervision of the government's document disclosures under the rule. In most districts, the defendant receives what the United States Attorney decides to disclose. Disclosure policies vary widely from one prosecutor's office to another; in some, the defendant obtains access to the prosecutor's whole file while in others he receives the legal minimum (*i.e.*, the government's exhibits plus exculpatory and *Jencks* materials).[149] The *Manual for Complex Litigation* recommends a more active judicial role in complex criminal cases, but it also recognizes that voluntary discovery may be equally effective.[150] Thus, a defendant's access to government documents under Rule 16 remains largely a matter of prosecutorial discretion.

The limitations of Rule 16 have led criminal defendants to use

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[145] *See, e.g.*, *Orzechowski*, 547 F.2d at 983-85 (finding immaterial certain internal memoranda of the DEA containing policy guidelines for determining whether a substance was an unlawful isomer of cocaine). The adequacy of the agency's testing procedure was at issue at trial and the memoranda therefore were plainly relevant. Although the court did not address the issue, the memoranda do not appear to be exempt under the FOIA. They contained no deliberative matter (exemption b(5)) and their disclosure would hardly risk circumvention of statutes or regulations (exemption b(2)). *See also* Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d 1051 (D.C. Cir. 1981)(en banc).

[146] 562 F.2d 1144, 1151 (9th Cir. 1977).

[147] *Id.* *See also* United States v. Wahlin, 384 F. Supp. 43, 47-48 (W.D. Wis. 1974).

[148] United States v. Layton, 2 GOV'T DISCLOSURE SERV. ¶ 81,390 (N.D. Calif. 1981) (trial court in criminal case denied defendant's request for a FOIA search for CIA records on the Jonestown massacre). In *Brown*, on the other hand, the defendants were charged with smuggling heroin into a prison. One of the defendants sought to obtain discovery, both under Rule 16 and under the FOIA, of the Bureau of Prisons' records on the defendants' alleged act. *See also* the DeLorean case, discussed *infra* note 246.

[149] *See* Feffer & Abrams, *Trial of a Criminal Tax Fraud Case: Prosecution and Defense Perspectives*, 6 LITIGATION, Spring, 1980, at 19.

[150] MANUAL FOR COMPLEX LITIGATION, *supra* note 112, at § 6.10.

Rule 17(c) of the Federal Rules of Criminal Procedure for discovery purposes. That rule permits them to subpoena nonparties (including federal agencies) to produce relevant documentary evidence in court at any time prior to trial. Although Rule 17(c) is only supposed to permit parties to obtain evidence for trial,[151] private practitioners assert that it is an invaluable discovery device in white-collar cases when the prosecutor does not have all the relevant documents or refuses to disclose, on grounds of immateriality, the documents which he has acquired.[152] Rule 17(c) authorizes the trial court to order the pretrial production of the subpoenaed documents; but, if the defendant wishes to obtain the documents prior to trial, it is necessary, or at least advisable, to file a motion for the issuance of the subpoena.[153] In *United States v. Iozia*,[154] Judge Weinfeld formulated the rigorous showing that the movant must make to obtain pretrial production:

> (1) That the documents are evidentiary and relevant;
> (2) That they are not otherwise procurable by the defendant reasonably in advance of trial by exercise of due diligence;
> (3) That the defendant cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial;
> (4) That the application is made in good faith and is not intended as a general fishing expedition.[155]

Despite the courts' general endorsement of *Iozia*, practitioners report that substantial document discovery may be obtained under Rule 17(c) if the defendant demonstrates real need. Courts do not expect the defendant to know the evidentiary value of the documents until he has seen them and the government has presented its case. Thus, a defendant need not introduce the discovered documents into evidence and may find some of them more useful than others. While Rule 17(c) is technically not a discovery device, it serves the same function by allowing the defendant to obtain documents before trial.

Rule 17(c) subpoenas have two distinct advantages over FOIA requests. First, the defendant may obtain agency records exempt under the FOIA. A striking example of this occurs in prosecutions for defrauding the United States when courts order agencies to produce bank examiners' reports (exemption b(8)) or internal memoranda (exemption b(5)) that reflect what the agency knew, at a particular time, about the defendant's activities or representations. Second, the defendant may obtain a more timely response under Rule 17(c) than under the FOIA. The subpoena is returnable prior to trial but there is no assurance that a FOIA request will receive a similarly timely response, especially from law enforcement agencies which have significant backlogs of FOIA requests.[156] The criminal practitioner is thus well advised, in the limited time between charge and trial, to concentrate document discovery efforts on mastering those obtained from the prosecutor under Rule 16(a)(1)(C) and on seeking through a Rule 17(c) subpoena whatever other documents he needs.

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[151] *See* United States v. Nixon, 418 U.S. 683, 698 (1974).

[152] *See, e.g.*, Doramus, *supra* note 142.

[153] 2 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 274, at 155 (1982).

[154] 13 F.R.D. 335 (S.D.N.Y. 1952).

[155] *Id.* at 338.

E. Production of Documents in Agency Adjudication

In 1970, the Administrative Conference recommended that parties to formal adjudicatory proceedings have access through discovery to all relevant, unprivileged information.[157] The recommendation addressed six discovery tools (including the production of documents and tangible things) and specified minimum standards for their use.[158] To ensure that the administrative process remained speedier and less expensive than the judicial, the Conference assigned a major role to the presiding officer. With respect to document discovery, the Conference recommended that the parties exchange evidentiary exhibits and witness lists at a prehearing conference[159] and that the parties be required to apply to the presiding officer for an order if they wished to obtain the production of additional documents.[160] Most agencies have substantially complied with the Conference's recommendation for affording full discovery under the control of the presiding officer. In 1977, fifteen out of the twenty independent agencies to which the recommendation applied were in substantial compliance, three were in partial compliance, and only two (the NLRB and the United States Postal Service) were not in compliance.[161]

Despite this greater availability of discovery in agency adjudication, parties continue to use the FOIA for discovery purposes. Many agencies still do not authorize the presiding officer to order the parties to produce relevant documents, thus limiting document discovery from the agency or other parties to the prehearing exchange of exhibits.[162] Under this procedure a party only receives notice of an opponent's case, not documents that might undermine that case or support his own case. Although at some agencies the presiding officer may use his control over the parties' prehearing exchange to provide further discovery,[163] the parties' inability to compel the production of relevant documents naturally encourages the use of the FOIA. The FCC has approved this use of the FOIA, instructing parties to adjudicatory proceedings to make FOIA requests whenever they seek document discovery from the agency.[164] The Commission thus avoids the creation of duplicative disclosure mechanisms and retains final authority to make release decisions.[165] The FDA also uses the FOIA in this manner, but the FDA, unlike the FCC, lacks subpoena authority from Congress; it is therefore unlikely that a presiding officer at the FDA has statutory authority to order the agency to produce relevant documents. Thus, if a party to an FDA adjudicatory proceeding wishes to discover agency records not included in the agency's submission of its case, the presiding officer usually suggests that the party make a FOIA request.[166]

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[156] One practitioner reports that he filed FOIA requests prior to his client's criminal trial to obtain information on an agency's control over its informants. Years later, long after the completion of the trial and appellate process, the agency is still releasing records to him on a regular basis.

[157] ACUS Recommendation 70-4, 1 C.F.R. § 305.70-4 (1983).

[158] *See id.*

[159] *See id.* at .70-4(1).

[160] *See id.* at .70-4(6)(b).

[161] ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION IMPLEMENTATION SUMMARY 7-8 (1977).

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[162] Among the agencies contacted, only the FTC (16 C.F.R. § 3.37 (1983)), the Consumer Product Safety Commission (16 C.F.R. § 1025.33 (1983)), the NRC (10 C.F.R. § 2.744 (1983)), the Department of Energy (10 C.F.R. § 205.198 (1983)), and the National Highway Traffic Safety Administration in the Department of Transportation (49 C.F.R. §511.33 (1983)) explicitly authorize the presiding officer in an adjudicatory proceeding to order a party (including the agency) to produce relevant documents. At the EPA (40 C.F.R. § 22.19(b)(1982)), the SEC (17 C.F.R. § 201.8(d)(1982)), the CFTC (17 C.F.R. § 10; 42(a)(1982)), the FERC (18 C.F.R. § 1.18 (1982)), the Federal Reserve Board (12 C.F.R. § 263.6(c)(1983)), the OSHA (29 C.F.R. § 2200.51 (1982)), the Department of Agriculture (7 C.F.R. § 1.140 (1983)), and the FDA (21 C.F.R. § 12.85 (1982)), the presiding officer lacks that authority, but he may order the parties to exchange their witness lists and documentary exhibits prior to the hearing. At the FCC, the presiding officer may order private parties to produce relevant documents, but he may not order the agency to do so (47 C.F.R. § 1.325 (1982)). At the INS, the rules of practice do not provide for discovery but do afford a party or his attorney prehearing access to the Service's evidence (8 C.F.R. § 292.4(b)(1983)). Attorneys at several other agencies report that discovery of the agency's case is available to the parties to adjudicatory proceedings even though the applicable rules of procedure do not formally provide for it. Examples include pilot and airplane certificate proceedings before the National Transportation Safety Board (49 C.F.R. pt. 821 (1982)) and contractor and grantee debarment proceedings in the Department of Housing and Urban Development (24 C.F.R. pt. 24 (1982)).

[163] At the CFTC, for example, the Commission has required the Division of Enforcement to disclose all exculpatory or *Brady* material when it submits its case-in-chief. *See*, *e.g.*, *In re* First Guar. Metals Co., [1980-82 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 21,074 (1980). The presiding officer often conducts a hearing to determine whether the Division has fulfilled its disclosure obligations. At the FDA, the presiding officer may require a party to produce all prior reports authored by a witness, or on which the witness relies, under threat of refusing to permit the witness to testify. At other agencies, such as the Federal Reserve Board, the presiding officer may engage in considerable jawboning to convince the parties to include additional relevant documents in their prehearing evidentiary submissions.

[164] 47 C.F.R. § 1.325(b) (1982). The Commission's rules do not subject it to orders to produce documents in adjudicatory proceedings, even when one of its bureaus is a party.

[165] The Commission itself determines appeals from initial denials of FOIA requests by the Executive Director. 47 C.F.R. §0.461(k)(1982). While the Office of the Executive Direc-

The Conference's Discovery Recommendation, on the other hand, recognized that the FOIA cannot satisfy a private party's discovery needs.[167] Because a party to an agency adjudication needs more information than the public does, he should have greater access than the public. The FCC recognizes this need when it uses FOIA appeals to determine the scope of discovery available to a party. In the FOIA appeal of *Gilmore Broadcasting Corp.*,[168] the Commission held that the Broadcast Bureau must release certain exempt documents from its investigatory files to ensure the respondent a fair license revocation hearing. The Commission then issued a protective order barring the requester (the respondent in the licensing proceeding) from publicly disclosing these sensitive documents. This discretionary, nonpublic release of exempt records does not violate the FOIA's "any person access" standard for nonexempt records. Although most agencies still maintain a uniform access policy (*i.e.*, all FOIA requesters obtain the same access),[169] the Commission's limited experience demonstrates that an agency may use FOIA procedures to afford parties to litigation access to agency records not available to other FOIA requesters.[170]

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tor is responsible for all initial denials, it normally follows the recommendations of the operating bureau with custody of the records (*i.e.*, the party to the proceeding).

[166] *See, e.g.,* Sterling Drug, Inc. v. Harris, 488 F. Supp. 1019, 1023 (S.D.N.Y. 1980). Agency staff do not have that option and must be content with a private party's submission.

[167] The Conference recommended that the presiding officer have authority to order the agency conducting the proceeding to produce relevant documents. 1 C.F.R. §305.70-4(6)(c)(1983). For the discussion in the consultant's report on the inadequacy of the FOIA as a substitute discovery device, see Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89, 133-35.

[168] 69 F.C.C.2d 2105 (1978). For other FOIA appeals by parties to formal adjudicatory proceedings, see New England Broadcasting, Inc., 52 RAD. REG. 2d (P&F) 1054 (1982); New England Broadcasting, Inc., 52 RAD. REG. 2d (P&F) 1418 (1982); Mid-Continent Telecasting, Inc., 56 F.C.C.2d 814 (1975).

[169] *See, e.g.*, 21 C.F.R. § 20.21 (1982) (FDA).

[170] The Commission recently completed an evaluation of its discovery rules and decided to make only two minor changes. *See* Discovery Procedures in Adjudicatory Hearings, Fed. Reg. 51869 (Nov. 18, 1982). Approximately one-fourth of the practitioners who responded to the Commission's survey indicated that Commission procedures did not afford parties adequate access to Commission files that were not routinely available to the public. The remainder of the respondents were either satisfied with present procedures or had no need to use them. Most respondents did believe, however, that the Commission should establish a discovery procedure affording access, on the basis of need, to Commission records not routinely available to the public. The respondents also approved the Commission's recent decision

In addition to affording any discovery required by rule, agencies have due process obligations. It is generally accepted, for example, that in enforcement proceedings agencies must disclose exculpatory material as well as the prior statements of agency witnesses upon completion of their direct testimony.[171] In addition, although the courts generally have upheld the NLRB's refusal to adopt discovery rules,[172] they have recognized in dicta that a denial of discovery in a particular case may so prejudice a party as to be a denial of due process.[173] What is involved in these cases is not really a right to prehearing discovery, but the right to present proof at the hearing itself. Due process includes the right to be heard in one's own defense[174] and a due process violation may result if an agency denies a party access to evidence that is crucial to presenting that defense.[175] Thus, a minimum level of discovery may be constitutionally required.[176]

III. Uses of the FOIA for Discovery Purposes

Discovery is the most efficient mechanism for obtaining disclosure of agency documents relevant to a proceeding. Available free of charge, it ordinarily offers greater access than does the FOIA. Furthermore, an agency's production of documents in discovery necessarily precedes the trial or hearing for which the documents are sought. On the other hand, a litigant making a FOIA request pays the agency's search and duplica-

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requiring parties to make discovery requests to the presiding officer for the production of nonpublic records submitted by private persons before seeking them under the FOIA. *See* Central Ala. Broadcasters, Inc., 70 F.C.C.2d 1762, 1766-67 (1979). For the consultant's report containing these findings, see M. Paglin, Report on Evaluation of the Federal Communications Commission's Discovery Procedure in Adjudicatory Hearings 61-63 (1982).

[171] On the constitutional and statutory bases for the *Jencks* rule in administrative enforcement proceedings, see Harvey Aluminum, Inc. v. NLRB, 335 F.2d 749, 753-55 (9th Cir. 1964).

[172] *See, e.g.*, Trojan Freight Lines, Inc. v. NLRB, 356 F.2d 947, 948 (6th Cir. 1966); NLRB v. Globe Wireless, Ltd., 193 F.2d 748, 751 (9th Cir. 1951). *But see* NLRB v. Safeway Steel Scaffolds Co., 383 F.2d 273, 278 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1969).

[173] *See* NLRB v. Valley Mold Co., 530 F.2d 693, 695 (6th Cir. 1976), and cases cited therein.

[174] Goss v. Lopez, 419 U.S. 565, 579 (1977).

[175] The opportunity to be heard includes, in most proceedings, the opportunity to submit one's proof and to have it considered by the agency decider. *See, e.g.*, Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954).

[176] *Cf.* McClelland v. Andrus, 606 F.2d 1278, 1286 (D.C. Cir. 1979) (lack of access by federal employee in adverse action proceeding to "uniquely relevant" report could, depending on what the report shows, do "violence to our conception of fair procedure and due process"); Marroquin-Manriquez v. INS, 699 F.2d 129, 135 (3d Cir. 1983) (denial of discovery did not result in fundamentally unfair proceeding because alien had access to information by other means).

tion costs, obtains the same access as everyone else, and has no assurance that the agency will release the records in time for the party to use them in litigation. Nevertheless, parties or potential parties to litigation often use the FOIA in place of normal discovery procedures. This Part explores the reasons for those uses and analyzes their impact on the government.

A. *The Use of the FOIA to Obtain Information for a Potential Suit against the Government*

The FOIA provides a mechanism for obtaining the release of agency records prior to the filing of a lawsuit, at a time when discovery is not yet available. For example, persons injured in accidents occurring on federal installations or involving on-duty federal personnel or equipment are naturally interested in obtaining any official reports or regularly kept records (*e.g.*, hospital records or performance records on equipment) that might shed light on the incident or help determine whether to file a lawsuit. In most instances the suit would be against the United States under the Federal Tort Claims Act. Because the *Feres* doctrine bars most suits by servicemen under the Act,[177] they often use the FOIA to determine whether a private manufacturer or supplier of equipment is a potential defendant. Federal employees contemplating title VII antidiscrimination suits against the government also use the FOIA to obtain agency personnel records. Similarly, government contractors, prior to bringing a contract dispute before a Board of Contract Appeals, routinely use the FOIA to obtain records on contract specifications or on the agency's disallowance or allocation of the contractor's costs.[178]

Courts have condemned abusive and frivolous lawsuits brought with nothing more than hope and faith in the discovery process.[179] The FOIA thus serves an important function in assisting potential litigants to determine whether they have a valid claim. Former Rule 11 of the Federal Rules of Civil Procedure provided that an attorney's signature on a pleading constituted a certification that he had read the pleading and that to the best of his knowledge, information, and belief there was "good ground to support it."[180] In 1983, the Supreme Court amended

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[177] Feres v. United States, 340 U.S. 135 (1950).

[178] Boards of Contract Appeals afford discovery similar in scope to that available in the district courts under the Federal Rules of Civil Procedure. Peacock, *Discovery Before Boards of Contract Appeals*, 13 PUB. CONT. L.J. 1 (1982).

[179] *E.g.*, Rhinehart v. Stauffer, 638 F.2d 1169, 1171 (9th Cir. 1979); Anderson v. Cryavoc, Inc., 96 F.R.D. 431, 431 (D. Mass 1983).

[180] Courts construed the "good ground" requirement to apply to both the factual and legal elements of the complaint. *See, e.g.*, Heart Disease Research Found. v. GM, 15 Fed. R.

Rule 11 to strengthen the certification requirement. By signing a pleading, the attorney now certifies not only his belief that the pleading is "well grounded in fact," but also that he has formed that belief after "reasonable inquiry."[181] The new rule, as well as the majority of the cases interpreting the former rule, require an attorney to conduct a preliminary factual investigation prior to filing a complaint. On occasion it will be necessary for an attorney to obtain publicly available agency records to corroborate the basis for a client's claim. The FOIA provides a mechanism for obtaining that corroboration and fullfilling the Rule 11 obligation.

Prelitigation use of the FOIA for discovery purposes also occurs when a litigant already has an adequate factual basis for a claim. Many FOIA requesters, having decided to bring suit, merely wish to discover relevant agency records earlier than normal discovery procedures would permit. For these litigants, the FOIA provides an effective, relatively inexpensive, and, in most cases, surprisingly speedy tool for obtaining relevant documents from government hospitals, military bases, and other federal installations. This prelitigation use of the FOIA occurs routinely in tort, employment discrimination, and contract suits against the government.

Government lawyers representing agencies in litigation are ambivalent about the use of the FOIA as a discovery tool when reciprocal discovery is not available. Some believe it unfair because they must work hard to "catch up" on discovery while their better prepared adversaries push for an early trial date. Others argue that a potential litigant's access to more complete information may convince the litigant not to file suit or to accept an early settlement. All seem to agree that the government suffers no prejudice that it cannot overcome with hard work. The government lawyers' principal concern is that the litigant may obtain agency records that are privileged in the discovery context (*e.g.*, confidential safety investigations).

B. The Use of the FOIA to Obtain Information about a Potential Governmental Proceeding against the Requester

The government must also investigate the factual basis of its case before bringing suit. Quite often, a potential defendant learns of an investigation before the government initiates a formal action or proceeding: The arrival of an IRS special agent alerts the taxpayer that he is

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Serv. 2d 1517, 1519 (S.D.N.Y. 1972). *See also* Advisory Committee Notes to 1983 Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 198 (1983).

[181] FED. R. CIV. P. 11.

the subject of a criminal tax investigation; a friend informs a corporate officer that a SEC investigator has interviewed him and shown him the Commission's order of investigation naming the officer; the government serves the subject with a subpoena or other investigatory demand. In all these situations, the requester may use the FOIA defensively to attempt to discover what the government knows.[182]

Although the requester may use the information obtained through the FOIA to prepare for an eventual trial or hearing, the availability of the FOIA is more significant for purposes of prelitigation advocacy because the requester will have access to discovery once the government initiates an enforcement proceeding. Criminal tax practitioners confirm that the most effective advocacy in criminal tax cases occurs before indictment when the defense attorney has an opportunity to convince government attorneys not to proceed criminally. Similar preindictment advocacy, often in the form of plea bargaining, occurs in the defense of white-collar crime. Such advocacy, to be effective, must be based on adequate information.[183]

Persons under investigation do not obtain much useful information under the FOIA. An agency may withhold investigatory records under exemption b(7)(A), if the release of the records would "interfere with" prospective or pending enforcement proceedings.[184] The exemption does not afford blanket protection to open investigatory files, but, as a practical matter, FOIA requesters obtain very little useful information on the factual or legal basis for an ongoing investigation. Usually, the most useful information obtained is confirmation of whether the requester is under investigation. For example, following an inspection by the OSHA, an employer may file a FOIA request for the inspector's report. If the agency withholds the report on the basis of exemption b(7)(A), the employer knows it is the subject of an investigation. The agency's description of the records withheld may communicate additional useful information on the scope or status of the investigation. By filing subsequent requests at regular intervals, the employer may learn

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182. The FOIA requester may simultaneously file a Privacy Act request, 5 U.S.C. § 552a(d)(1982), which affords the requester access to personal records that the agency must withhold from the general public under FOIA exemption b(6).

183. Among the contacted agencies, the IRS, the Tax and Antitrust Divisions in the Department of Justice, the Department of Energy, the FTC, the CFTC, and the SEC report substantial use of the FOIA by persons under investigation. The requesters are seeking agency records pertaining to the individual requester (*i.e.*, the investigatory file), law enforcement manuals or other internal guidelines describing the steps in the investigatory process, agency rulings or statements of policy on enforcement matters, and other records that contain information on investigatory policies and enforcement techniques.

184. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236 (1978).

whether the agency has terminated the investigation in its favor. An employer also may obtain information on the focus of a complex health investigation by securing the release of factual studies prepared by the agency which identify the practices under scrutiny.[185]

The 1974 FOIA amendments that narrowed the investigatory records exemption [186] prompted widespread efforts by persons under investigation, particularly potential respondents in unfair labor practice proceedings before the NLRB, to use the FOIA to discover records in investigatory files. In *NLRB v. Robbins Tire & Rubber Co.*,[187] the Supreme Court squelched those efforts. The Court found that although Congress amended exemption b(7) to clarify that the exemption did not "endlessly protect" investigatory material,[188] Congress intended to protect prospective enforcement proceedings from any harm caused by the premature release of evidence and information.[189] Thus, exemption b(7)(A) does not require agencies to establish "interference with enforcement proceedings" on a document-by-document basis but allows them to withhold whole categories of sensitive records in open investigatory files.[190] Lower courts have applied this categorical approach to permit agencies to withhold witness statements, documentary evidence, agents' reports and work papers, and internal memoranda that were compiled for law enforcement purposes.[191] Any agency may withhold these records even though the requester may eventually obtain them through discovery in an enforcement proceeding.[192] Withholding is also permissible if the records would be privileged in discovery (*e.g.*, they are privileged work product), because in that case their release "would increase a defendant's resources and thereby weaken and interfere with the government's efforts in an enforcement action."[193]

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[185] General studies on health hazards are not exempt investigatory records compiled for law enforcement purposes.

[186] Exemption b(7), as originally enacted in 1966, permitted the withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." The amended exemption permits the withholding of investigatory records compiled for law enforcement purposes only to the extent that the release of the records would result in one of six specified harms. The first listed harm is interference with enforcement proceedings.

[187] 437 U.S. 214 (1978).

[188] *Id.* at 230.

[189] *Id.* at 232.

[190] *Id.* at 236. *Robbins Tire* thus afforded categorical protection to witness statements in unfair labor practice proceedings.

[191] *E.g.*, Barney v. IRS, 618 F.2d 1268, 1272-74 (8th Cir. 1980); Parker/Hunter, Inc. v. SEC, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,873 (D.D.C. Feb. 3, 1981); Fedders Corp. v. FTC, 494 F. Supp. 325, 329-30 (S.D.N.Y.), *aff'd*, 646 F.2d 560 (2d Cir. 1980); OKC Corp. v. Williams, 489 F. Supp. 576, 586 (N.D. Tex.) *aff'd*, 614 F.2d 58 (5th Cir.), *cert. denied*, 449 U.S. 952 (1980); Hunt v. CFTC, 484 F. Supp. 47, 50 (D.D.C. 1979); Steinberg v. IRS, 463 F. Supp. 1272, 1273-74 (S.D. Fla. 1979); Grabinski v. IRS, 478 F. Supp. 486, 487 (E.D. Mo. 1979).

[192] Murphy v. FBI, 490 F. Supp. 1134, 1137-38 (D.D.C. 1980).

Private practitioners confirm the limited utility of the FOIA for discovering the substance of the government's case against a person under investigation.[194] Leading criminal tax practitioners report that they no longer make FOIA requests to the IRS or to the Tax Division for records pertaining to their clients because they have never obtained the release of any useful records.[195] The NLRB reports that FOIA requests by respondents in unfair labor practice proceedings slowed significantly after the *Robbins Tire* decision. None of the criminal practitioners interviewed use the FOIA to obtain precharge discovery of the government's case, and the use of the FOIA to obtain access to open investigatory files in criminal cases is in fact comparatively rare.[196]

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[193] Kantner v. IRS, 433 F. Supp. 812, 818 (N.D. Ill. 1977).

[194] Although agencies are able to withhold most of the requested records, persons under investigation continue to make FOIA requests because they have nothing to lose: They may obtain useful information; if they do not, they will incur no significant fees because most agencies do not charge requesters for search time for withheld records. Lawyers responsible for FOIA matters at the IRS, the Tax, Antitrust, and Criminal Divisions in the Justice Department, the SEC, the CFTC, and the FTC confirm that they are able to prevent the release of sensitive investigatory records but cite the annoyance and effort involved in responding to FOIA requests by persons under investigation. Enforcement attorneys also object to the distraction of working with the agency's FOIA staff, but the post-*Robbins Tire* case law contains few if any instances where a court has ordered an agency to release records from an open file to a person under investigation. *See* cases cited *supra* note 191. *See also* Lively, *supra* note 48, at 79 (discussing burden for exemption b(7)).

[195] They attribute the continuation of FOIA requests by persons under investigation to the ease of making requests and to the stories within the profession of occasional "surprise" releases of useful information. None of the literature on discovery in criminal tax cases offers much encouragement on the use of the FOIA. *See* Culverhouse, *Defending Criminal Tax Trials: Discovery Strategy*, 18 TRIAL, May, 1982, at 52; Feffer and Abrams, *supra* note 149, at 19; Garbis, *Defenses and Discovery in Tax Fraud Investigations*, 10 CUM. L. REV. 655 (1980). In addition, two leading practitioners' treatises discourage its use. *See* H. BALTER, TAX FRAUD AND EVASION § 12.07[4] (5th ed. 1983) (FOIA "affords very little use to defendants in tax-related prosecutions"); R. FINK, TAX FRAUD: AUDIT, INVESTIGATION AND PROSECUTION (1980).

[196] In 1981, the FBI denied in whole or in part only 294 requests for records in open investigatory files (exemption b(7)(A)), while it denied in whole or in part 1912 requests for investigatory records to protect personal privacy (exemption b(7)(C)) and 1452 requests for investigatory records to protect a confidential source (exemption b(7)(D)). The former exemption applies only to open files, while the latter two exemptions apply to closed files. OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT (FOIA) ANNUAL REPORT 3 (1981). During 1982, the FBI invoked exemption b(7)(A) on 228 occasions and exemptions b(7)(C) and b(7)(D) on 1268 and 1034 occasions respectively. *Id.* Other law enforcement agencies report a similar imbalance with more withholdings based on exemptions b(7)(C) and b(7)(D)) than on exemption b(7)(A). In 1981, the Drug Enforcement Administration invoked exemption b(7)(A) on 81 occasions and exemptions b(7)(C) and b(7)(D) on 229 and 264 occasions respectively. The Criminal Division invoked exemption b(7)(A) only 34 times, while it invoked exemptions b(7)(C) and b(7)(D) 315 and 130 times respectively. *Id.*

The FBI and the DEA contend that criminals and their accomplices do not use the FOIA for legitimate discovery purposes but to evade detection, to derail investigations by uncovering and driving away informants, and to uncover and kill informants.[197] These abuses are primarily associated with FOIA requests for records in closed files where the existing exemptions may not be adequate to prevent the release of sensitive information. For records in closed investigatory files, a law enforcement agency cannot invoke exemption b(7)(A) to prevent premature discovery of the government's case, but can only withhold information to protect a confidential source (exemption b(7)(D)) or to protect personal privacy (exemption b(7)(C)). In accordance with these exemptions, the agency can redact the names of witnesses and agents and any other information that would disclose the identity of a confidential source or constitute an unwarranted invasion of personal privacy,[198] but the agency must release most other requested records from a closed file. Because the requester obtains records containing a good deal of factual information,[199] he can often combine that information with other known information to determine the identity of an informant.[200] The proper response to this abuse is not to restrict the use of the FOIA, but to enact a new exemption affording blanket protection for a certain number of years to organized crime or similar investigatory files.[201] The cause of the problem is the inadequacy of the exemptions and not the use of the Act for discovery purposes.

Finally, persons under investigation have been able to obtain under the FOIA law enforcement manuals and records containing information about the agency's position on enforcement matters. These records are normally not investigatory records compiled for law enforcement purposes, and the agency must release them unless it can invoke the exemption for internal personnel rules and practices (exemption b(2)) or for deliberative materials (exemption b(5)). Under exemption b(2), the agency may withhold a law enforcement manual only if it is "predominately internal" and if its disclosure raises significant risks of "circumventing agency regulations or statutes."[202] Under exemption b(5), the agency may withhold predecisional matter, but it must release records which embody agency policy or explain action already taken by the agency.[203] The limited scope of these exemptions may permit a person under investigation to learn how the agency conducts its investigations and how it has resolved similar matters in the past. That information may be useful in persuading a government attorney not to institute formal enforcement proceedings.

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[197] 1 *Hearings*, *supra* note 19, at 843 (testimony of FBI Director William H. Webster); *id.* at 1081 (submission of Acting DEA Administrator Francis M. Mullen, Jr.).

[198] Nix v. United States, 572 F.2d 998, 1003, 1006 (4th Cir. 1978); Radowich v. United States Att'y, 658 F.2d 957, 959-60 (4th Cir. 1981).

[199] The agency normally need not release factual information from an open file because to do so would interfere with enforcement proceedings by indicating the scope of the investigation.

[200] FBI Director Webster has warned of the "green sedan phenomenon," which can occur when the agency discloses to a FOIA requester a seemingly innocuous bit of information (*e.g.*, the fact that the witness drove a green sedan). The requester, in light of other information known to him, can acertain the identity of the information's source. For Director Webster's remarks before the American Bar Association, see *National Security, Law Enforcement, and Business Secrets Under the FOIA*, 38 Bus. Law. 705, 711 (1982) (remarks of Director William H. Webster) [hereinafter cited as *National Security*], and for his remarks before the Congress in the 1981 Hearings on the FOIA, *see* 1 *Hearings*, *supra* note 19, at 843.

[201] Most of the recent bills introduced in the Congress to amend the FOIA have included provisons granting the government blanket authority to withhold organized crime records for a certain number of years. The FBI desires similar blanket protection for terrorism and foreign counter-intelligence files. *See National Security*, *supra* note 200, at 711.

C. The Use of the FOIA to Obtain Agency Generated Records for Use in Private Litigation

Two general categories of agency records are often relevant to private litigation to which the government is not a party: records generated by the government and records submitted to the government by private persons. The records in the first category are most often in the government's exclusive possession, but a private person submitting documents to the government usually retains copies. Thus, the purpose of the FOIA requester in seeking the two types of records may be quite different. In the former case the requester is seeking discovery from the government, while in the latter case he is really seeking it from the submitter.

Parties to litigation frequently use the FOIA to obtain records in the first category, and this seldom raises problems. Agency files contain much government generated data on health, economic, and environmental matters that may be relevant to private litigation. Both plaintiffs and defendants use the FOIA to obtain governmental investigative reports which, although not themselves admissible as evidence, often provide useful leads on the basis of liability or defenses.[204] Litigants naturally seek to obtain these reports as quickly as possible—usually prior to the commencement of litigation—and the FOIA provides earlier access to agency records than does discovery.[205]

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[202] Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d, 1051, 1074 (D.C. Cir. 1981)(en banc).

[203] Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866-8 (D.C. Cir. 1980).

[204] Agencies such as the National Highway Traffic Safety Administration, the OSHA, the Mine Safety and Health Administration, and the Consumer Product Safety Commission prepare investigative reports on accidents that occur on highways, in workplaces, or in a consumer's home. Exemption b(7) does not cover these reports because the agencies do not compile them for law enforcement purposes.

Agency personnel often prefer private litigants to use the FOIA because responding to a FOIA request is more convenient than responding to a Rule 45 or state court subpoena. The agency has a mechanism in place for processing FOIA requests and may make a FOIA release without concerning itself about a discovery court's time limits and demands for authentication. In the case of a subpoena, the agency's lawyer must reassure the often distraught subpoenaed employees and must negotiate a reasonable disclosure mechanism which eliminates, if possible, the need for any testimony by agency officials. The Department of Labor thus treats a subpoena for a compliance officer's report the same as a FOIA request,[206] *i.e.*, the Department processes the subpoena in the same fashion and "cuts" the same material from the document, thus affording the subpoenaing party no greater access than the FOIA requester.[207] Of course, upon a showing of need, a party may obtain through discovery greater access to agency records than a FOIA requester. Department of Labor officials recognize that a discovery court may order the production of a compliance officer's report without the FOIA redactions, but they do not recall that ever having occurred. The Office of the Comptroller of the Currency in the Department of the Treasury likewise treats subpoenas for nonexempt records the same as FOIA requests, but it produces bank examiners' reports covered by exemption b(8) only under court order.[208] Under its housekeeping regulation,[209] the Office of the Comptroller will disclose exempt records without formal service of a subpoena upon the agency custodian, but a party must establish by affidavit that litigation is pending and that he needs the report for litigation purposes.

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[205] The Consumer Product Safety Commission's FOIA procedures are an exception. Section 6(b) of the Consumer Product Safety Act, 15 U.S.C. § 2055(b) (1982), requires the Commission to take reasonable steps to assure the accuracy of product information disclosures and to afford manufacturers a reasonable opportunity to submit comments to the Commission before disclosure. The Supreme Court has held that these statutory requirements apply to FOIA releases. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1979) Exemption b(3) authorizes the agency to withhold the records during the comment process. *Id.* FOIA requesters must wait six months to a year to obtain the release of accident reports subject to section 6(b) procedures. Although other agencies are not subject to similar constraints, the targets of allegedly inaccurate reports have occasionally sought to enjoin their release by the agency. *See* Reagan Bush Committee v. Federal Election Comm'n, 525 F. Supp. 1330 (D.D.C. 1980) (court refused to enjoin release of audit report).

[206] Unless further enforcement proceedings are contemplated, the Department will release under the FOIA a compliance officer's report on an industrial accident after redacting the officer's recommendations and the names of informants. Miles v. Department of Labor, 546 F. Supp. 437, 440-41 (M.D. Pa. 1982); Lloyd & Henniger v. Marshall, 526 F. Supp. 485, 487 (M.D. Fla. 1981). *See also* New England Apple Council, Inc. v. Donovan, 560 F. Supp. 231, 235 (D. Mass. 1983) (routine redaction of officer's name impermissible under exemption b(7)(C)).

[207] The Department of Agriculture also processes subpoenas for nonexempt agency records as FOIA requests. 7 C.F.R. § 1.15 (1983).

The common sense approach of these agencies supports the conclusion that parties to private litigation should be able to use the FOIA for discovery purposes. A party should be required to use a subpoena only to obtain exempt agency records; neither the party nor the agency should be subjected to the more burdensome discovery procedures of Rule 45 or of analagous state court rules, if the party seeks only first level access to agency records.

If a party uses the FOIA to augment prior or simultaneous Rule 45 discovery, different issues arise. Supplemental use of the FOIA chiefly occurs in complex litigation and raises few problems if all the relevant documents are in the custody of a single or limited number of individuals[210] so that the government has to produce the documents only once. If the relevant documents, or copies thereof, are scattered in hundreds of federal offices and installations throughout the country, the situation is somewhat different. Duplicitous searches and a loss of control over document production, two of the resulting problems, are discussed below.[211]

D. *The Use of the FOIA to Obtain Privately Submitted Agency Records for Use in Private Litigation*

The use of the FOIA by a party or potential party to private litigation to obtain the second category of agency records (*i.e.*, records submitted to the government by private persons) raises a number of special problems because the party is actually seeking discovery from the private submitter. The agencies most frequently encountering this use of the FOIA are those which investigate business conduct that may subsequently become the subject of private antitrust, securities, or other commercial litigation.[212] In the course of the investigation, the agency, through compulsory process or voluntary submissions, obtains many documents from persons under investigation and other persons with relevant evidence. Government files thus became repositories of documents of interest to parties to private litigation.

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[208] The court normally issues a protective order.

[209] 12 C.F.R. § 4.19 (1983).

[210] Thus, in Colonel Hebert's and General Westmoreland's libel suits against CBS, all of the relevant documents on the Vietnam War were in several military records centers. It was a matter of indifference to the military departments whether the parties sought the records through Rule 45 subpoenas or FOIA requests.

[211] For a discussion of these issues, see *infra* Part III(G).

[212] Among the agencies contacted, the Antitrust Division, the FTC, the SEC, the CFTC, the Department of Energy, and the Federal Reserve Board have encountered this use of the FOIA.

Once private litigation commences, a party may seek discovery directly from the private submitter, but discovery of the documents from the government is often more efficient. This form of discovery is analogous to the phenomenon of second degree discovery that has become widespread in recent years. Under that approach, a party may discover documents discovered by another party to an earlier action from that other party so long as the documents would be discoverable in the subsequent action from the persons who originally afforded the discovery. Proponents of second degree discovery argue that it is inefficient to require a party to rediscover documents that another party has already discovered in an earlier action.[213]

Despite the apparent analogy, government investigatory files differ from a prior party's first degree discovery files. The government did not obtain the documents through discovery in litigation but through an investigatory process in which the government's power to compel is extensive and the individual's ability to resist limited. Whether the government's files should be available to a private litigant under the FOIA or only under court subpoena is less important than whether they should be available at all: Should the government transfer its investigatory advantage, which is based on society's paramount interest in law enforcement, to private parties for litigation purposes? If the transfer is justified, it does not make much difference whther it occurs through discovery or under the FOIA.

Courts generally permit both plaintiffs and defendants in private litigation to obtain privately submitted, unprivileged documents from the government through a Rule 45 subpoena.[214] The government's paramount interest "in having justice done between litigants in the federal courts militates in favor of requiring a great effort on its part to produce any documents relevant to a fair termination of [the] litigation."[215] A discovery court may protect the government from unduly burdensome requests by considering, when determining whether a subpoena directed at the government is unreasonable or oppressive, whether the discovering party has made full use of discovery procedures to obtain the requested documents in a more efficient way. But the availability of discovery from the document's author or submitter does not bar the issuance of a subpoena against the government.[216]

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[213] Sherman & Kinnard, *supra* note 84, at 284-91; Note, *Non-party Access to Discovery Materials in the Federal Courts*, 94 HARV. L. REV. 1085, 1089-91 (1981); Comment, *Government Use of Civil Investigative Demand to Obtain Materials Discovered in Private Antitrust Litigation*, 79 COLUM. L. REV. 804 (1979). For cases granting second degree discovery, see United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979); Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir. 1964), *cert. denied*, 379 U.S. 900 (1966). In *GAF*, the court upheld the Antitrust Division's use of a civil investigative demand (CID) to obtain second degree discovery from a private antitrust plaintiff. Congress codified that result in the 1980 amendments to the Antitrust Civil Process Act. Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 2(b)(1)-(3), 1980 U.S. CODE CONG. & AD. NEWS (194 Stat.) 1154 (codified at 15 U.S.C. § 1312 (1982)).

[214] *See* Freeman v. Seligson, 405 F.2d 1326, 1336 (D.C. Cir. 1968); Westinghouse Electric Corp. v. Burlington, 351 F.2d 762, 766-67 (D.C. Cir. 1965). *But see* Friedman v. Bache Halsey Stuart Shields, Inc., Misc. No. 83-0026 (D.D.C. 1983) (plaintiff's motion to compel the non-party CFTC to produce privately submitted records denied because plaintiff failed to prove

Congress has on occasion barred the disclosure of privately submitted agency records. In the Antitrust Civil Process Act of 1962,[217] Congress established elaborate custodianship provisions to ensure the confidentiality of documents submitted to the Antitrust Division in response to a civil investigative demand (CID). The 1976 amendments to the Act further guaranteed this confidentiality by exempting privately submitted documents from disclosure under the FOIA[218] and by stating in the legislative history that the documents were not discoverable under the Federal Rules of Civil Procedure except by a submitter who became a defendant in an antitrust suit brought by the government.[219] The Antitrust Division therefore cannot release CID material to a nonsubmitter under the FOIA or in response to a discovery subpoena. Furthermore, the submitter may obtain the return of the original documents (but not of any copies properly made by the government) upon completion of any governmental action or proceeding involving the documents or, if the government has not commenced an action or proceeding, within a reasonable time.[220] In the Federal Trade Commission Improvements Act of 1980,[221] Congress similarly restricted discovery of documents submitted to the Commission in response to a CID. Except for requests for disclosure to Congress, federal agencies, or state officials, the Commission may disclose these documents only in "Commission adjudicatory

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that the records were not discoverable from the private submitters). The *Friedman* case is now on appeal.

[215] *Westinghouse*, 351 F.2d at 767.

[216] *Id*. at 767 n.8.

[217] Antitrust Civil Process Act, Pub. L. No. 87-664, 1962 U.S. CODE CONG. & AD. NEWS (76 Stat.) 548 (codified at 15 U.S.C. §§ 1311-14 (1982)).

[218] Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, § 104(e), 1976 U.S. CODE CONG. & AD. NEWS (90 Stat.) 1389 (codified at 15 U.S.C. § 1314 (1982)).

[219] H.R. REP. NO. 94-1343, 94th Cong., 2d Sess. 15 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, 2572, 2609-10.

[220] 15 U.S.C. § 1313(e) (1982).

[221] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, §13, 1980 U.S. CODE CONG. & AD NEWS (94 Stat.) 374, 380-85 (codified at 15 U.S.C. § 57b-1 (1982)).

proceedings or in judicial proceedings to which the Commission is a party."[222] Only documents submitted pursuant to compulsory process (*i.e.*, a CID) are thus protected. Another section in the same Act, however, exempts from release under the FOIA (but not from subpoenas) all records submitted to the Commission in the course of an investigation.[223]

In the absence of a statutory provision analogous to those applicable to the Antitrust Division and the FTC, a party to litigation may seek privately submitted records either by a FOIA request or by a third party subpoena served on the agency custodian. A private litigant's choice of the FOIA to obtain records presents two problems to those who have submitted documents. First, a submitter does not know what documents an adversary may have obtained under the FOIA. Second, an agency may release FOIA-exempt records that contain trade secrets or other confidential business information (exemption b(4)). The former problem is a common one in litigation; a party often does not know what information an opposing party previously has obtained. Discovery permits a party to learn whether an opponent has made any FOIA requests.[224] The Administrative Conference addressed the latter problem in Recommendation 82-1, adopted in June, 1982.[225] The Conference recommended that Congress amend the FOIA to require agencies to notify a submitter prior to the release of any records that the submitter designated as confidential.[226] The Recommendation did not address the disclosure of trade secrets or confidential business information in response to discovery subpoenas, but the consultant's report intimates that this problem did not exist in that context.[227]

Despite the concern over the use of the FOIA to obtain trade secrets or confidential business information, the FOIA should remain open to parties to private litigation seeking first level access to privately submitted agency records. Parties seeking access to these records are not engaged (as other FOIA requesters may be) in legalized industrial espionage but are seeking evidence for use in litigation. Often, they are seeking to determine whether any basis for a lawsuit exists. Only a small percentage of the records sought are likely to contain either common-law trade secrets or trade secrets and confidential business information exempt from disclosure under FOIA exemption b(4). The records are evidence of past business behavior; their staleness[228] makes it unlikely that disclosure will afford a nonlitigation advantage to the submitter's competitors. Furthermore, the Conference has recognized that it is possible to develop FOIA procedures to protect confidential business information in agency files.[229] Although Congress has yet to act on the Conference's recommendation, most agencies have voluntarily adopted procedures to protect the interests of submitters.

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[222] *Id.* at § 14, (94 Stat.) 387 (codified at 15 U.S.C. § 57b-2(d)(1)(c)(1982)).

[223] *Id.* at § 14, (94 Stat.) 388 (codified at 15 U.S.C. § 57b-2(f)(1982)).

[224] FOIA requests are themselves public records and therefore do not deserve work-product protection.

[225] 1 C.F.R. § 305.82-1 (1983).

[226] The notice provision affords submitters an opportunity to file with the agency written objections to the agency's release of the records and to seek de novo review in the courts of the agency's release decision. The Conference believed that these additional safeguards were necessary to protect the interests of submitters because the FOIA process encouraged agencies to withhold "only those items which the agency itself needs to defend—and private documents are more likely to be given up by the agency to avoid prolonged litigation by requesters." O'Reilly, *Regaining a Confidence: Protection of Business Confidential Data Through Reform of the Freedom of Information Act*, 34 AD. L. REV. 263, 303 (1982).

[227] *See id.* at 269-70 ("judicial protection" will attach).

In addition, trade secrets and confidential business information are unlikely to receive increased protection from unwarranted disclosure in discovery. Statutes and agency rules, with few exceptions, do not require an agency to notify a submitter prior to producing a document in response to a discovery subpoena.[230] The agency need not, and perhaps cannot, raise any claim of privilege on behalf of the submitter.[231] Even if the agency records contain common-law trade secrets, the agency's disclosure in response to a subpoena is authorized by law and thus does not violate the Trade Secrets Act.[232] Agencies do not have established procedures for responding to subpoenas seeking the production of privately submitted documents and are subject to the same incentives as in the FOIA context to surrender the documents without a fight. In practice, agency counsel attempt to contact the submitter before disclosing any documents, but often counsel does not have sufficient time to give effective notice and can do no more than inform the court that the subpoenaed documents contain information for which the private submitter might desire a protective order.[233] A submitter who is not a party to the litigation may encounter difficulty in securing a protective order when the agency produces the records because there is no clear authority recognizing the submitter's status as the real party in interest.[234] Thus, the absence of discovery safeguards similar to the FOIA safeguards proposed in Conference Recommendation 82-1 makes it difficult to argue that trade secrets and other confidential business information receive effective protection in the discovery context.

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[228] As a practical matter, private litigants can only obtain the release of agency records from closed investigatory files. If a litigant seeks the release of records from a fresh or open file, the agency will invoke exemption b(7)(A). Thus, it is likely that any records released to the litigant will pertain to events that took place several years in the past.

[229] Recommendation 82-1, 1 C.F.R. § 305.82-1 (1983).

[230] Section 222(5) of the Futures Trading Act of 1982, Pub. L. No. 97-444, 1983 U.S. CODE CONG. & AD. NEWS (96 Stat.) 2294, 2310, *amending* 7 U.S.C. § 12(f) (1982), is one of the few statutes expressly requiring an agency to notify a submitter that it has received a court subpoena for information submitted by the submitter. The CFTC must give the submitter fourteen days notice before disclosing the information. The FTC has committed itself by rule to afford a submitter an opportunity to seek a protective order before it releases privately submitted materials in "Commission administrative or court proceedings." 16 C.F.R. § 4.10(g)(1983). In the past, the Commission, when issuing adjudicatory subpoenas, has agreed to notify the submitter before releasing confidential information in response to an official Congressional request or to the compulsory process of a court. *See, e.g.,* Exxon Corp. v. FTC, 665 F.2d 1274, 1279 (D.C. Cir. 1981); FTC v. Anderson, 631 F.2d 741, 746 (D.C. Cir. 1979).

[231] In *In re* Westinghouse Elec. Corp. Uranium Contract Litig., 76 F.R.D. 47, 59 (W.D. Pa. 1977), the court held that a private party had no standing to object that the documents which the court ordered it to produce were secret Canadian government documents. The court, however, did order the party's counsel to notify the Canadian government so that it might seek confidential treatment for the documents. *But see* Overby v. United States Fidelity and Guar. Co., 224 F.2d 158, 162-63 (5th Cir. 1955) (government may assert privilege to prevent production by bank of bank examiner's report in bank's possession).

Counsel for the agencies contacted report that private litigants employ both FOIA requests and discovery subpoenas to gain access to privately submitted agency records and generally obtain the same documents in both instances.[235] Although discovery may afford access to exempt records, a party often can obtain that access through a FOIA request. For example, if it is obvious that certain confidential business information in agency files is relevant to pending litigation, the submitter and the FOIA requester normally agree to the agency's production of the records under a protective order.[236] Closing the FOIA to requests for records generated by private submitters therefore would serve no purpose.

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[232] *See* Canal Auth. v. Froehlke, 81 F.R.D. 609, 612-13 (M.D. Fla. 1979); Pleasant Hill Bank v. United States, 58 F.R.D. 97, 98 n.1 (W.D. Mo. 1973).

[233] Even if the submitter is a party to the private litigation in which the records are sought, he has no assurance that he will receive notice of an opposing party's service on an agency custodian of a third party subpoena. If the submitter is not a party to the litigation, he will receive notice only if the agency or the court chooses to give it to him.

[234] In the analogous context of efforts by private litigants to obtain access to grand jury materials under FED. R. CRIM. P. 6(e), the Supreme Court has recognized the standing of the submittees to challenge the disclosure. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 n.8 (1979)("release of the transcripts to their civil adversaries could result in substantial harm to them").

[235] Private antitrust plaintiffs and defendants do not receive under the FOIA the CID material available only to defendants in government antitrust suits. Motion Picture Ass'n of Am. v. Department of Justice, 80 Civ. 6612 (S.D.N.Y.). Antitrust Division lawyers report that persons under investigation are insisting with greater frequency that the Division use the cumbersome CID machinery to obtain the submission of documents. They estimate that voluntary submissions now comprise less than one-half of the documents obtained by the Division. The submitters' increased concern for confidentiality naturally reduces the utility to private litigants of the Division's investigatory files.

[236] Under the Federal Rules of Civil Procedure, the key issue in most such cases is not whether trade secrets or confidential business information will be disclosed, but under what

E. The Use of the FOIA to Obtain Agency Records Unavailable in Discovery Because They Are Privileged

Inadvertent or careless FOIA releases of exempt records are a rarity.[237] More frequently, the public information officer's release decision is, in the words of government litigators, "mistaken." It is perhaps more accurate to say that the officer's perspective on claiming an exemption is different than that of a litigating attorney. This difference is particularly apparent with respect to the deliberative process component of exemption b(5). The public information officer's job is to release as much information as possible, while the attorney's job is to defend the government's position in litigation. The attorney is particularly sensitive about releasing internal documents critical of the agency's present position or advocating a contrary position; public information officers and lower level program people are likely to be less sensitive. In addition, deliberative process and work-product claims have special cogency when raised in litigation and lose much of their force when considered in the abstract in response to a FOIA request.

Government counsel are nearly unanimous in their condemnation of the parallel use of the FOIA for "backdoor" discovery from the government during the pendency of litigation. They fear that they will lose control over the flow of documents to the other parties and that their opponents will obtain the release of privileged documents, or of documents that can be used to surprise the government at trial or hearing. FOIA requests by opposing counsel particularly irk Department of Justice lawyers because they believe that counsel should not communicate directly with the client agency on matters that are in litigation, but should address all communications to the Department.[238] A number of agencies have responded by adopting procedures which involve litigat-

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conditions they will be disclosed. 8 C. WRIGHT & A. MILLER, *supra* note 80, § 2043, at 305 (1970).

[237] *But see infra* notes 307, 308 and accompanying text.

[238] This latter, ethical objection is unfounded because DR 7-104(A)(1) only prohibits counsel from communicating with a "party" whom he knows to be represented by a lawyer on the subject matter of the communication. While this disciplinary rule does apply to communications between lawyers representing private parties and government officials, the government officials covered by the prohibition of communications with a "party" include only those officials who have the power to commit or bind the government with respect to the subject matter in question. Legal Ethics Committee of the District of Columbia Bar, Op. No. 80 (1979) (interpreting DR 7-104(A)(1) on "Communicating With One of Adverse Interest"). A public information officer is not such an official.

ing attorneys in the FOIA process.[239]

Although most courts have analyzed the issues raised by claims of privilege in discovery and exemptions under the FOIA as "separate issues" requiring "separate analysis,"[240] a minority of courts have held that the government cannot raise a claim of privilege in defense to a discovery subpoena if it would be required to release the documents under the FIOA. In *Moore-McCormack Lines, Inc. v. I.T.O. Corp.*,[241] the court enforced a Rule 45 subpoena to produce the conclusions as well as the factual portions of an accident report against a Department of Labor compliance officer. After ruling, perhaps erroneously,[242] that the Department could not withhold any portion of the report under the FOIA, the court held that the government could not raise a claim of privilege for a document that is already in the public domain. "It is sufficient for us to hold that Rule 26(b) does not authorize an agency to withhold any records which the Act commands it to disclose."[243] The court in *Firestone Tire & Rubber Co. v. Coleman*[244] reached a similar conclusion. Ruling on discovery motions in an action for preenforcement review of a federal motor vehicle safety standard, the court held that "[i]nformation which the government must disclose to the public generally may not be withheld from a member of the public who engages the government in litigation."[245] In *Firestone*, unlike in *Moore-McCormack*, the discovering party had filed FOIA requests with the agency for the records which it subsequently moved the court to compel the agency to produce; and its FOIA suit to enjoin the agency from withholding the requested records had been consolidated with the preenforcement review action.[246]

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[239] See *infra* text accompanying note 309.

[240] Washington Post Co. v. Department of Health and Human Servs., 690 F.2d 252, 259 (D.C. Cir. 1982).

[241] 508 F.2d 945 (4th Cir. 1974).

[242] Other courts have held in FOIA litigation that the Department of Labor may withhold the conclusions in a compliance officer's accident report. *E.g.*, Miles v. Department of Labor, 546 F. Supp. 437, 439-40 (M.D. Pa. 1982); Lloyd & Heminger v. Marshall, 526 F. Supp. 485, 486-87 (M.D. Fla. 1981). In *Moore-McCormack*, the court actually read the compliance officer's "Conclusions" and found that they were no more than factually based inferences (*i.e.*, a list of factors which the compliance officer believed caused the accident) devoid of policy-making or deliberative material. 508 F.2d at 948-49.

[243] 508 F.2d at 950.

[244] 432 F. Supp. 1359 (N.D. Ohio 1976).

[245] *Id.* at 1371 n.23.

[246] Thus the *Firestone* court had jurisdiction to determine the discovering party's access under the FOIA as well as under the discovery rules. On the other hand, at least two courts have afforded criminal defendants access in a criminal case to government records not exempt from release under the FOIA, despite the absence of FOIA requests. United States v. Brown, 562 F.2d 1144, 1152 (9th Cir. 1978); United States v. Wahlin, 384 F. Supp. 43, 47 (W.D. Wis. 1974). Since the *Brown* and *Wahlin* courts did not have jurisdiction to enjoin the withholding

The approach of the *Moore-McCormack* and *Firestone* courts is often followed in complex litigation. In the government's recent antitrust suit against *AT&T*, for example, the Special Masters' Guidelines for the Resolution of Privilege Claims provided that "information obtainable by a member of the public under the Freedom of Information Act is not privileged."[247] Even in the absence of such a guideline or court ruling, Antitrust Division lawyers often consult the Division's FOIA staff to determine whether a document sought in discovery is the type of document that the FOIA staff would release. This approach recognizes that it is absurd for the government to waste the court's time by raising a claim of privilege for a document that the government must release to the general public under the FOIA.

If *Moore-McCormack* and *Firestone* reflected the prevailing approach, parties to litigation would not resort to the FOIA to discover privileged documents because the privilege rules would allow the party to obtain the documents in discovery. By employing different criteria for determining access rights, the FOIA and discovery mechanisms function independently of each other; and the FOIA, as the Fifth Circuit held in *United States v. Murdock*,[248] does not "enlarge the scope of discovery beyond that already provided by the Rules."[249] Consequently, the majority view is that a document may be privileged in discovery and nevertheless available to the general public under the FOIA.[250] In these instances, the party may use the FOIA to obtain discovery of privileged documents.

A number of considerations support the prevailing approach of *Murdock*. First, it does not burden a discovery court with deciding FOIA issues.[251] Second, permitting a discovery court to order an agency to release nonexempt agency records is inconsistent with Congress' grant of exclusive jurisdiction to the district courts over suits by FOIA reques-

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of nonexempt agency records, the decisions can only be understood as exercises of the courts' inherent authority to provide discovery in criminal cases. The Ninth Circuit subsequently disapproved *Brown* and restricted the criminal defendant's discovery to that available under the federal criminal rules. United States v. United States District Court (DeLorean), 717 F.2d 478, 480-81 (9th Cir. 1983).

[247] United States v. AT&T, 86 F.R.D. 603, 635 (D.D.C. 1979). The special masters were Professors Geoffrey Hazard and Paul Rice.

[248] 548 F.2d 599 (5th Cir. 1977).

[249] *Id.* at 602. *See also* Fruehauf Corp. v. Thornton, 507 F.2d 1253, 1254 (6th Cir. 1974). Both *Murdock* and *Fruehauf* were criminal prosecutions.

[250] *E.g.*, Playboy Enter., Inc. v. Department of Justice, 677 F.2d 931, 936 (D.C. Cir. 1982).

[251] If the nonexempt status of the records was not in dispute, the party already would have obtained them under the FOIA.

ters.[252] Third, the *Murdock* approach prevents a party from delaying a proceeding by seeking additional "discovery" under the FOIA. Courts have resisted efforts to postpone judicial trial dates[253] or to enjoin administrative proceedings[254] to allow a party to obtain a FOIA release. If the same documents were made available to the party in discovery, delay would more likely occur. Finally, the *Murdock* approach is more consistent with Congressional intent to open up the administrative process to the inquiring public. While parties to litigation may benefit from the FOIA access provided to the public, Congress did not intend to afford litigants additional discovery rights.[255]

Although it does not expand the scope of discovery, the *Murdock* approach permits the indirect use of the FOIA for discovery purposes. Unable to assert FOIA availability as a defense to a claim of privilege in discovery, a litigant may still request the documents under the FOIA.[256] Generally, because the FOIA *should* provide everyone with a minimum level of access to government records and discovery *should* provide litigants with a second level of access to relevant records, a litigant *should* not obtain access to privileged materials through the FOIA. But the ideal relationship between the FOIA and discovery is unachievable as long as courts develop separate bodies of FOIA and discovery law.

In several recent cases, FOIA courts ordered the release of agency records recognized as privileged in the discovery context. In *Playboy Enterprises, Inc. v. Department of Justice*,[257] the FOIA court ordered the release of the Rowe Report. The report reviewed the involvement of a FBI informant in the 1965 murder of a civil rights worker by Ku Klux Klan members.[258] Several district courts, in lawsuits brought against the United States under the Federal Tort Claims Act by the murder victim's survivors, had held the report to be privileged.[259] Similarly, in *Weber*

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[252] 5 U.S.C. § 552(a)(4)(B) (1982).

[253] *E.g.*, Fruehauf Corp. v. Thornton, 507 F.2d 1253 (6th Cir. 1974) (criminal defendant unsuccessfully sought mandamus to compel postponement).

[254] *E.g.*, Columbia Packing Co. v. Department of Agriculture, 563 F.2d 495 (1st Cir. 1977). Federal courts have the equitable power to enjoin administrative proceedings until a party obtains the release of nonexempt records under the FOIA, but they should take such a serious step only upon the strongest showing of irreparable injury. *Id.* at 500. *See also* Encyclopedia Britannica, Inc. v. FTC, 517 F.2d 1013 (7th Cir. 1975).

[255] *See* Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 22, 24 (1974).

[256] Of course, one disadvantage to this approach is that the litigant has no assurance that the trial or hearing will await the agency's response to his FOIA request.

[257] 677 F.2d 931 (D.C. Cir. 1982).

[258] A task force established by the Attorney General submitted the 302 page document to him in July, 1979. *Id.* at 933.

[259] *See, e.g.*, Peck v. United States, 88 F.R.D. 65, 74 (S.D.N.Y. 1980); *cf.* Liuzzo v. United States, 508 F. Supp. 923, 940 (1981) (court did not independently assess the privilege claim but relied on the determination of the Attorney General).

Aircraft Corp. v. United States,[260] the FOIA court ordered the release of witness statements obtained in a confidential safety investigation of a fatal air crash. Courts have traditionally recognized the privileged, official information status of these reports.[261]

The incongruity apparent in *Weber* and *Playboy* results from applying different standards to release decisions under the FOIA and in discovery. Both *Playboy* and *Weber* were exemption b(5) cases raising the issue of the exempt status of factual material in otherwise deliberative records. The exemption does not protect purely factual materials "appearing in . . . documents in a form that is severable without compromising the private remainder of the document."[262] To simplify a great deal, an agency must segregate and release factual portions of otherwise deliberative records if the release would not expose the deliberative process.[263] The official information privilege, on the other hand, more broadly protects investigative reports from discovery.[264] In the leading case recognizing a qualified privilege for witness statements,[265] the court held that the factual nature of the statements did not bar a claim of privilege if the agency, to obtain complete information, had assured the witnesses of confidentiality (*i.e.*, that the agency would use their information only for safety and not for litigation purposes).[266] The *Weber* court held that exemption b(5) did not incorporate this civil discovery privilege for confidential investigative reports.[267] The *Playboy* court also expressly rejected, without citation, civil discovery precedents which had recognized that the selection, interpretation, and integration of facts by high level agency officials—the very process involved in the preparation of the report in *Playboy*—are part of the deliberative process and thus privileged from disclosure.[268]

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[260] 688 F.2d 638 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 3534 (1983).

[261] *E.g.*, Machin v. Zuckert, 316 F.2d 336, 339 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963).

[262] EPA v. Mink, 410 U.S. 73, 91 (1973).

[263] *See, e.g.*, Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977). The records withheld in *Playboy* and *Weber* were factual and their disclosure would not expose the deliberative process other than to reveal what facts the author of the report or the witnesses thought material. *Playboy*, 677 F.2d at 935. Therefore, the decisions were correct under the prevailing interpretation of exemption b(5). *Weber*, however, is in conflict with two earlier FOIA cases that afforded witness statements in confidential safety investigations greater protection under exemption b(5). Cooper v. Department of the Navy, 558 F.2d 174 (5th Cir. 1977); Brockway v. Department of the Air Force, 518 F.2d 1184 (8th Cir. 1975). After this Article went to press, the Supreme Court reversed the court of appeals decision in *Weber*. United States v. Weber Aircraft Corp., 52 U.S.L.W. 4351 (March 20, 1984). *See infra* note 272. (All references to *Weber* are to the court of appeals decision.)

[264] The scope of the discovery privilege is similar to that afforded by FOIA exemption b(7) for investigatory records compiled for law enforcement purposes.

[265] Machin v. Zukert, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963).

[266] *Id.* at 339.

[267] *Weber*, 688 F.2d at 644. The court relied upon the Supreme Court's cautious approach to the incorporation of discovery privileges into exemption b(5). *See, e.g.,* EPA v. Mink, 410 U.S. 73 (1973); Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979).

In a third decision ordering the release of privileged agency records, *Washington Post Co. v. Department of Health and Human Services*,[269] the FOIA court ordered the release of the nonfederal employment and financial interests of consultants employed by the National Cancer Institute. The same court of appeals, in an earlier lawsuit challenging the grant program administered with the aid of these consultants, had upheld the Department's claim of privilege.[270] The *Washington Post* case involved exemption b(6)—the personal privacy exemption—and the court of appeals reached a different result on the exemption issue than it reached on the privilege issue because, again, the applicable criteria were different. In discovery, the disclosure of the consulants' employment and financial reports depended upon a balancing of the party's interest in disclosure against the government's need to foster the gathering of information from the consultants. In the FOIA context, the court balanced the public interest in disclosure against the consultants' privacy interests. In *Association for Women in Science v. Califano*,[271] the earlier case in which the court denied discovery, the party's need for the information did not override the privilege for confidential reports because the party had access to the information in another form (*i.e.*, the government had provided the discovering party with direct access to the consultants). The public, represented by the Washington Post, had no access outside of the FOIA and therefore had a greater need for the same records.

Because Congress requires the courts to interpret the FOIA as providing separate access to government records, some litigants inevitably will be able to discover privileged documents through FOIA requests. Although the Supreme Court could narrow one of these "gaps" in the FOIA exemptions by abandoning the factual-deliberative dichotomy in exemption b(5) cases,[272] additional gaps will arise in other areas. For example, the Court of Appeals for the District of Columbia Circuit recently held that exemption b(4) protects only trade secrets that are used in the process of production.[273] The common law, as the court recognized, protects a broader category of trade secrets—any secret that gives one business a competitive advantage.[274] The gaps that have so far appeared have not prompted any major use of the FOIA for discovery purposes but they do encourage some litigants to use the FOIA. Although a circumvention of the discovery rules, this use of the FOIA is not abusive: it only permits a party to obtain access to "privileged" documents that are available to everybody else.

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[268] *Playboy*, 677 F.2d at 935. *See supra* note 259 and the discovery cases cited therein. Those cases, especially *Peck*, relied on Judge Weinstein's analysis in *In re* Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 587-89 (E.D. N.Y. 1979).

[269] 690 F.2d 252 (D.C. Cir. 1982).

[270] Association for Women in Science v. Califano, 566 F.2d 339 (D.C. Cir. 1977).

[271] *Id*.

[272] That interpretation of exemption b(5) is inconsistent with the law of civil discovery and with the Congress's overall purpose to afford FOIA requesters no more access to government records than that which is routinely available to parties to litigation. It has even prompted a number of lower courts to hold that exemption b(5) does not protect "factual" statements of witnesses protected from discovery under the work product doctrine when obtained in anticipation of litigation. *See, e.g.*, Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 734-37 (5th Cir. 1977), *rev'd on other grounds*, 437 U.S. 214 (1978); Associated Dry Goods

F. The Use of FOIA to Obtain Irrelevant Records

Because relevancy limitations on discovery do not apply to FOIA requests, a party may obtain the FOIA release of records that are irrelevant to a pending action. Relevance and burden are pragmatic concepts designed to keep lawsuits within reasonable bounds; that documents are insufficiently relevant to be discoverable does not mean that they are of no value to the party. When relevancy is borderline and the burden of complying with a discovery request is considerable, the trial judge has broad discretion to sustain a relevancy objection.[275] He also may deny burdensome requests that only marginally advance the objectives of providing information to the parties and of narrowing the issues in the lawsuit. The civil discovery rules authorize the trial judge to limit the discovery of relevant documents to matters occurring at a particular time or at a particular place or pertaining to a particular transaction.[276] A party may easily avoid these parameters on discovery

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Corp. v. NLRB, 455 F. Supp. 802, 808-09 (S.D.N.Y. 1978). For a FOIA decision which is more faithful to the civil discovery approach, see Hoover v. Department of the Interior, 611 F.2d 1132 (5th Cir. 1980) (report of nontestifying expert exempt under the FOIA because not discoverable routinely but only upon a showing of exceptional circumstances).

The Court's recent opinion in United States v. Weber Aircraft Corp., 52 U.S.L.W. 4351 (March 20, 1984), indicates a greater willingness to recognize discovery privileges as a basis for withholding records under exemption b(5). In *Weber*, the Court held that exemption b(5) incorporates the *Machin* privilege for confidential safety investigations. The Court indicated that even factual material could be withheld. *Id.* at 4353 n.17. Under this approach, FOIA and discovery courts normally will apply the same standards to decide whether to order the government to disclose a record. Although this approach makes it easier for the government to withhold potentially privileged documents from a FOIA requester, it does not guarantee that a FOIA court will reach the same result as a discovery court.

[273] Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

[274] *Id.* at 1286-89.

[275] 4 MOORE'S FEDERAL PRACTICE, *supra* note 132, at § 26.56[1] n.35.

[276] 8 C. WRIGHT & A. MILLER, *supra* note 80, at 287. Under the 1983 amendments to Rule 26, the trial judge may act on his own initiative. *See* FED. R. CIV. P. 26(b)(1)(iii)(trial court may limit unduly burdensome or expensive discovery).

through use of the FOIA.

Private parties defending against governmental enforcement proceedings often desire questionably relevant documents. First, parties seek to learn of prior inconsistent positions of the agency that may lessen the weight a court or an agency adjudicator will give to the agency's present position or that may expose the agency to charges of arbitrariness or selective prosecution. Second, parties are interested in the agency's internal operating procedures because that information may help a party to anticipate agency tactics or to challenge any departures from established procedures.

Courts often limit discovery of prior agency statements and internal manuals because their production may burden inordinately the agency. Neverthless, these matters are potentially relevant. Any inconsistency between the agency's present interpretation of a statute or regulation and its past interpretation affects the deference that a court gives the agency's present views.[277] An agency's inconsistent treatment of similarly situated persons becomes, at some point, arbitrary, or at least requires some explanation.[278] Finally, a violation of an agency's own regulations or any special, unfavorable treatment afforded a particular party may provide the party with grounds for relief.[279]

To balance the potential relevance of such documents with the potential burden on the agency, the courts afford discovery on a controlled rather than on a routine basis. Thus the courts have limited the scope of discovery when a party is seeking documents that may disclose agency inconsistency. For example, in judicial and administrative proceedings brought by the Department of Energy to enforce price control regulations, the courts and the Department's adjudicatory authority (the Office of Hearings and Appeals) have permitted some "contemporaneous construction" discovery. Through contemporaneous construction discovery, energy producers may seek prior statements[280] interpreting or applying agency regulations only if the regulation is ambiguous or silent on the issue in dispute[281] or if the agency seeks to apply retroactively a clarifying interpretive ruling.[282] The more recent cases have refused to formulate rules on the scope of contemporaneous construction discovery but balance "the potential relevance of the desired evidence, along with the likelihood of its existence, against the burden incurred by the agency in culling through its files."[283] Under this approach, the courts have limited the discovery of evidence of contemporaneous construction to particular periods of time or to particular agency filing systems.[284]

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[277] *See* Udall v. Tallman, 380 U.S. 1, 16 (1965). The weight a court gives an administrative interpretation of a statute or regulation depends on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, all of those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[278] Melody Music, Inc. v. FCC, 345 F.2d 730, 732-33 (D.C. Cir. 1965)(agency must explain different treatment afforded similarly situated applicants); IBM v. United States, 343 F.2d 914, 923 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966)(different treatment of similarly situated taxpayers arbitrary and illegal).

[279] *See* Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959) (agency bound by its own regulations); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) (selective prosecution defense to a criminal charge).

[280] The statements may be in the form of official interpretive rulings or actions taken by low-level inspectors or auditors. McMillan & Peterson, *supra* note 28, at 372-83.

The courts also have limited discovery of agency treatment of similarly situated third persons. The Court of Claims, in actions brought by the United States to redetermine excess profits, has permitted contractors to discover third party contract data from the Renegotiation Board but normally has denied discovery of cost data submitted by third party contractors to procurement agencies. Recognizing that "[o]nce the most immediately relevant data of the other [contractor's] case is at hand, inquiry into all its ramifications must be resolutely halted,"[285] the court has limited the scope of discovery to prevent the renegotiation of one contract from becoming an occasion for reviewing those of the contractor's competitors.[286] The Tax Court has taken a still firmer line against the discovery of private rulings or other determinations issued by the IRS to nonparty taxpayers. To establish relevance sufficient to permit discovery, a party must establish more than an inconsistency between the Service's prior, nonbinding ruling to another taxpayer and its treatment of the present taxpayer.[287] The Tax Court has reasoned that "even if the private letter rulings can be viewed as potentially relevant, such relevance is, nevertheless, too remote to cause the underlying document to be discoverable."[288]

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[281] *See* Gulf Oil Corp. v. Schlesinger, 465 F. Supp. 913, 916 (E.D. Pa. 1979).

[282] United States v. Exxon Corp., 87 F.R.D. 624, 633 (D.D.C. 1980).

[283] *Id.* at 634.

[284] For the similar treatment of contemporaneous construction discovery before the Department of Energy's Office of Hearings and Appeals, see Atlantic Richfield Co., 5 DOE (CCH) ¶ 82,521 (1980).

[285] Instrument Sys. Corp. v. United States, 546 F.2d 357, 361 (Ct. Cl. 1976).

[286] Boards of Contract Appeals have similarly limited discovery of third party contract data to those documents for which relevance is clearly demonstrated. Essex Elec. Engineers, DOT CAB No. 1025, 79-2 BCA (CCH) ¶14,158 at 69,711 (Nov. 8, 1979) (number of other contracts for which appellant sought discovery sufficiently limited). *See* Peacock, *supra* note 178, at 19-20.

[287] *See* Teichgraeber v. Commissioner, 64 T.C. 453, 456-57 (1975). *But see* Corelli v. Commissioner, 66 T.C. 220 (1976) (private rulings to nonparty taxpayer relevant to taxpayer's liability for negligence penalty). *See generally* Royal, *Discovery Process in the United States Tax Court*, 65 MASS. L. REV. 227, 232-35 (1980).

[288] Davis v. Commissioner, 69 T.C. 716, 722 (1978). In *Davis*, the taxpayer was seeking

Many courts have insisted that the discovering party make a "strong" or "prima facie" showing of impropriety before permitting any discovery on procedural irregularities or other agency improprieties.[289] If a party merely alleges that the agency succumbed to congressional or other political pressure, received ex parte communications, acted in bad faith or for an improper purpose, or violated its own regulations, the courts will deny discovery.[290] Criminal courts also deny discovery on claims of selective prosecution unless the defendant makes a prima facie showing that the government has not prosecuted other, similarly situated offenders and that the government's prosecution of him is selective, invidious, in bad faith, or based on impermissible considerations such as race, religion, or the exercise of a constitutional right.[291]

Relevancy limitations naturally encourage parties to litigation to use the FOIA. In *United States v. Exxon Corp.*,[292] an action to enforce the Department of Energy's petroleum pricing regulations, the defendant sought to discover internal agency documents construing a regulation the interpretation of which was in dispute. Limiting the scope of this discovery, the court established a cut-off date of September 1, 1976, the date when the Department of Energy issued an interpretive rule that defined a crucial term in the regulation. The court held that only documents dated prior to September 1, 1976, were relevant and thereby discoverable.[293] In two parallel FOIA actions, Exxon sought the release of all agency records construing the regulation, including documents dated subsequent to September 1, 1976.[294] Similarly, in *National Presto Indus-*

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the production of pre-1976 private rulings which were unavailable under 26 U.S.C. § 6110. *See infra* note 298.

[289] Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981); Environmental Defense Fund v. Blum, 458 F. Supp. 650, 663 (D.D.C. 1978).

[290] McMillan & Peterson, *supra* note 28, at 367-73. The authors argue that a lesser showing by the discovering party should suffice if the discovery sought involves neither allegations of moral turpitude nor inquiries into the thought processes of agency officials. *Id.* at 372-73.

[291] *E.g.*, United States v. Kahl, 583 F.2d 1351, 1353 (5th Cir. 1978); United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978).

[292] 87 F.R.D. 624 (D.D.C. 1980).

[293] *Id.* at 635-36.

[294] Exxon Corp. v. Department of Energy, 4 ENERGY MGMT. (CCH) ¶ 26,325 (D.D.C. 1981) (thoroughness of Department's search); Exxon Corp. v. Department of Energy, No. 80-2500 (D.D.C.) (transferred from the Southern District of New York, Sept. 16, 1980). Exxon obtained the release of a large number of records in response to its FOIA requests and vigorously litigated the thoroughness of the Department's search and the lawfulness of its withholding of responsive records, but the judge hearing the enforcement action ruled against Exxon on the merits before the judge hearing the FOIA actions determined whether the Department had improperly withheld 245 documents which it refused to release under the FOIA. United States v. Exxon Corp., 561 F. Supp. 816 (D.D.C. 1983) (decision on merits). As of late 1983, the district court had still not decided the FOIA cases.

tries, Inc.,[295] a contractor, whose excess profits were subject to redetermination, sought comparative cost data contained in preaward surveys and in the submissions of third party contractors from various procurement agencies. The court, in an earlier interlocutory order vacating the trial judge's broad discovery order, had instructed the trial judge that third party contract data was discoverable only upon proof of relevance and notice to the third party.[296] When the court learned that the contractor had bypassed its discovery ruling by filing FOIA requests directly with the procurement agencies, the court ordered the suspension of discovery while the contractor pursued its FOIA requests. The court instructed the contractor to inform the trial judge when it had completed its FOIA discovery and to acquaint him with what it had discovered.[297]

In both *Exxon* and *National Presto* the FOIA requests imposed heavy burdens on the agencies involved and, in effect, deprived them of the protection from unreasonable demands afforded by the applicable discovery rules. In other areas, however, the use of the FOIA to discover documents of questionable relevance has become less controversial and often permits parties to litigation to discover an agency's working law. Thus, a taxpayer may use the FOIA to obtain private letter rulings issued by the IRS to other taxpayers and the background file documents with respect to those rulings[298]—information that courts normally consider irrelevant and nondiscoverable. An energy producer also may use the FOIA to obtain regional counsel memoranda responding to auditors' requests for interpretations of Department of Energy regulations.[299] As an agency develops routine procedures for releasing its determinations in other cases and for protecting the interests of the parties to those cases from unwarranted disclosure of personal or business data, this use of the FOIA becomes less burdensome.[300]

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[295] 218 Ct. Cl. 696 (1978).

[296] National Presto Indus., Inc., 216 Ct. Cl. 422, 429 (1978).

[297] The trial judge then could lift the suspension on discovery to the extent necessary for the contractor to obtain relevant information not discoverable under the FOIA. Judge Davis, writing for the Court of Claims, complained that "if the use of FOIA makes it possible despite our wishes, to make a *Jarndyce v. Jarndyce* out of this case, that is the responsibility of the Congress which enacted the FOIA, and of the courts Congress has designated to interpret and enforce the FOIA." 218 Ct. Cl. at 698. For a similar case before the Armed Services Board of Contract Appeals, see Murdock Contracting and Eng'g Co., ASBCA 204339 (1980). In *Murdock*, government counsel stopped providing discovery to the contractor when the contractor filed FOIA requests for irrelevant data on third party contracts. The Board member serving as trial judge did not rule on the propriety of counsel's action, but he did deny the contractor's motion to recover the extra expenses caused by the interrupted discovery.

[298] Strictly speaking, access to these records is not governed by the FOIA but by 26 U.S.C. § 6110 (1982), which governs the public inspection of the Service's written determinations and background file documents. However, the enactment of that section was prompted by a court decision holding that private letter rulings were not exempt from disclosure under the FOIA. Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298 (D.D.C. 1973), *modified and remanded*, 505 F.2d 350 (D.C. Cir. 1974). Congress accepted that result, enacting § 6110 to regulate the release of written determinations by providing certain safeguards, such as the deletion of identifying details.

Parties to litigation also have used the FOIA to obtain records that describe an agency's internal operating procedures or that contain information on possible procedural irregularities. These records are also questionably relevant and not normally discoverable absent some special showing. In *Lord & Taylor v. Department of Labor*,[301] for example, a defendant in a minimum wage and hours enforcement proceeding unsuccessfully sought the production in discovery of the Department's *Wages and Hours Division Field Operations Handbook*. The defendant employer subsequently obtained most of the handbook under the FOIA.[302] Likewise, in *FAA v. Tison*,[303] the National Transportation Safety Board, in a proceeding to revoke a pilot's license for landing on an unopened runway, had denied, on the grounds of minimal relevance and undue burden, the pilot's request for a large number of documents on the FAA's runway closings policy and on the subsequent opening of the runway in question. The pilot then obtained the same documents from the FAA under the FOIA.

G. The Use of the FOIA to Obtain an Additional Search For Relevant Records

The parallel use of the FOIA and discovery to obtain relevant documents, or "double-dipping" as it is sometimes called, occurs infrequently except in adjudicatary proceedings before a limited number of agencies. Discovery should provide parties to litigation with access to all documents necessary to prepare their case. Nevertheless, some parties use the FOIA for discovery because they believe that a FOIA search will produce additional documents, or will secure the earlier release of relevant documents.

A FOIA search may produce more relevant documents than a discovery search because public information officers are good searchers and have access to records that lawyers conducting a discovery search may not find. Public information officers may release documents that a lawyer, who represents an agency in litigation and thus looks at the same document with a more adversarial eye, would consider to be privileged. Furthermore, even a FOIA response which does not release any relevant documents may enable the requester to obtain additional documents in discovery. When responding to a FOIA request, the agency must notify the requester of its determination to withhold a record.[304] The requester may then formulate a specific discovery request based on the agency response.

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[299] Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868-70 (D.C. Cir. 1980).

[300] See the elaborate safeguards in 26 U.S.C. § 6110 (1982) for the release of written determinations by the IRS.

[301] Lord & Taylor v. Department of Labor, 39 Ad. L. 2d 635 (S.D.N.Y. 1976).

[302] *Id*. The decision of the FOIA court does not discuss the FOIA requester's unsuccessful efforts to obtain the same Handbook through discovery. That information came from attorneys in the Department of Labor.

[303] National Transportation Safety Board No. SE-5551.

Multiple FOIA requests to the constituent units of an agency also reach more record custodians, and uncover more responsive records, than a discovery request directed to the attorneys representing the agency. At most agencies, the base for conducting FOIA searches is broader because the agency's system of recordkeeping is highly decentralized.[305] If the agency expects to process FOIA requests efficiently and in compliance with the statutory time limits, a FOIA office with release authority must be located near the records. Far-flung agencies such as the military departments, the EPA, the Department of Energy, and the FAA release records at dozens if not hundreds of local, district, and regional offices around the country. Searching from the bottom up, public information officers may uncover records that the lawyers, searching from the top down in response to a discovery request, do not reach. Lower level program people may have kept long-forgotten studies, correspondence, or rulings on issues that are now the subject of litigation. Even in an agency as centralized as the Antitrust Division, lawyers coordinating responses to similar FOIA and discovery requests acknowledge that public information officers have a better sense of where to look than do lawyers and therefore may uncover more responsive, disclosable records.

A public information officer may not claim an exemption for a record that a litigating attorney would resist disclosing. If the record's custodian does not object, the public information officer normally arranges for its prompt release without consulting the agency's lawyers. Occasionally, a public information officer may inadvertently release an exempt record that would otherwise be privileged. Government litigation attorneys have a significant number of horror stories, most unverifiable, of inadvertent or careless releases.[306] In one verified instance, a regional office of the EPA afforded a FOIA requester access to a roomful of documents so that he could find the records that he wished the agency to release. The requester, who happened to be in litigation with the agency over the subject matter of the records, then argued that the government waived any claim of privilege with respect to the records in the room.[307] In another verified instance, the Department of Justice released a summary of a document while Justice Department attorneys were arguing in court that the document was privileged. The FOIA requester was a party to that litigation, and the court held that the Department had waived the privilege when it released the record under the FOIA.[308]

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[304] This notification must accompany all administrative denials and explain the reasons therefore. 5 U.S.C. § 552(a)(6)(A) (1982). If the requester sues to enjoin the withholding of agency records, the court may order the agency to prepare a more elaborate *Vaughn* index.

[305] The Department of Energy, for example, found that the amount of paper shuffling required to centralize FOIA releases made such a plan unworkable.

A number of agencies have adopted procedures to prevent inadvertent releases. These measures normally include involving the agency's attorneys in FOIA releases. The attorney representing the agency in litigation will learn of a FOIA request by a party to the litigation if the public information officer's search leads to the attorney's case file, but if the party seeks the release of technical documents (*e.g.*, economic or scientific studies) or correspondence discussing the agency's action, the public information officer's search may end with the program office's files. The attorney may have only copies of the requested records or may be unaware of their existence. In these instances, the attorney will not know of the FOIA request unless the agency has developed procedures for notifying him.

Thus, a growing number of agencies have informally instructed public information officers not to release records that appear to be related to pending litigation without contacting the agency's lawyers. At the NRC, for example, the Office of the Executive Director has instituted a procedure designed to ensure that the agency's trial attorneys receive notice of FOIA requests made on behalf of parties to pending adjudicatory proceedings. Under the procedure, trial attorneys prepare litigation notices to alert public information officers of pending administrative and judicial proceedings, and public information officers prepare summaries of FOIA requests for circulation among the attorneys.[309]

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[306] Such stories fuel government attorneys' fears that a public information officer's judgment on when to raise exemption claims may differ from that of a trial attorney. *See supra* text accompanying notes 237-39.

[307] Bethlehem Steel Corp. v. EPA, No. H82-517 (N.D. Ill.) (Dec. 2, 1983).

[308] Phillips Petroleum Co. v. Department of Energy, 4 ENERGY MGMT. (CCH) ¶ 9740 (D. Del. 1977).

[309] Other agencies, such as the Department of Health and Human Services, the EPA, and the Federal Reserve Board, also have tried to tighten their FOIA operations by involving their lawyers in release decisions.

Nevertheless, it is not easy to detect all litigation oriented FOIA requests. Requests often focus on generic safety issues (*e.g.*, the adequacy of fire fighting equipment at nuclear plants), and an attorney must identify requests that pertain to generic issues designated in pending licensing proceedings to determine whether the requests may be litigation related.

Similar protective measures are not feasible in all government agencies. In relatively small and centralized agencies like the NRC or the Federal Reserve Board, an agency may involve its trial attorneys in responding to litigation oriented FOIA requests and maintain accurate records of release decisions. In larger agencies, however, such as the military departments, the EPA, and the Department of Energy, centralizing and documenting release decisions in the same manner as denials would be inconsistent with the openness required by the Act. Timely release decisions are possible only if the field unit with custody of a record has authority to release it. In such cases, the agency's trial attorney, or the attorney in the Department of Justice representing the agency in court, simply cannot know with any degree of assurance what records the agency has released under the FOIA. Therefore, government attorneys face not only the danger of surprise but also the embarrassment of raising a claim of privilege for a document the agency already has released. A review of the various areas in which these problems may arise, however, indicates that the FOIA release of agency records seldom presents a serious problem to government litigators.

1. Parallel Use of the FOIA and Discovery in Civil Litigation in the Federal Courts.—Because the Federal Rules of Civil Procedure normally provide adequate discovery of relevant documents, the parallel use of the FOIA for discovery purposes rarely occurs in civil litigation in the federal courts. Counsel in the Litigation Division of the Office of the Army Judge Advocate General produced only one recent case (out of a varied case load of 1,500 pending cases) in which a party plainly used the FOIA for discovery purposes. In an enforcement action against a government contractor for failure to pay its employees time and a half for overtime,[310] the contractor's counsel surprised government counsel with records on weather conditions at the job site where the contractor's employees worked. The government suffered no prejudice, however, because the records were not particularly probative on the issue of whether the employees had worked the extra hours.[311] The other agencies contacted also reported few instances in which parties to litigation made substantial use of the FOIA to discover relevant documents. When such requests did occur, they usually could be explained as a result of either a breakdown in discovery[312] or the familiarity of the party's counsel with the agency's filing system—a familiarity which allowed him to make very specific FOIA requests.[313]

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[310] Jim Boothe Contracting & Supply Co. v. United States, No. 82-0038-H-B (S.D. Ala. Sept. 26, 1983). The dispute arose under the Contract Hours and Safety Standards Act, 40 U.S.C. § 330 (1982). The contractor brought suit for remission of the liquidated damages withheld by the government.

The parallel use of the FOIA and discovery occurs primarily in major environmental and tort litigation in which relevant documents are likely to be scattered in hundreds of repositories at dozens of different agencies. In these instances the purpose of the double-dipping is usually to verify the completeness of the government's discovery efforts rather than to substitute the FOIA for available discovery methods. Counsel at the EPA estimate that only in one percent of the agency's caseload does a private party make significant use of the FOIA to supplement discovery.[314] At the Land and Natural Resource Division of the Department of Justice, there were 500-600 pending cases in the spring of 1983, but only four parallel FOIA actions. In the hazardous waste enforcement area, for example, a waste generator who receives notice of potential responsibility usually responds by making FOIA requests to obtain additional information, but a generator served with a complaint normally restricts himself to discovery.

Although relatively rare, double-dipping may impose significant burdens on the government. In a class action brought against the United States by persons who suffered adverse reactions to the swine flu vaccination program,[315] a number of parties supplemented their discovery of relevant documents with FOIA requests. Because the government had already produced an estimated 50,000 documents in the national discovery phase of the litigation, government counsel requested that the agencies forward the FOIA requests to him so that he could notify the requester that the agency previously had released the requested records in discovery. Extensive parallel use of the FOIA also occurred in the Agent Orange litigation brought by Vietnam veterans against the United States and the chemical's manufacturers. The Air Force and a number of other agencies sought to lighten the burden of these requests by responding that they had already released the requested records in discovery.[316] In these cases, the parties using the FOIA appeared to be concerned that government counsel had not produced all the relevant documents during discovery. Finally, prior to the commencement of the recent litigation challenging the deployment of the MX missile system,[317] the plaintiffs made numerous FOIA requests to the Air Force to obtain records analyzing the environmental impact of the deployment. Upon filing suit, the plaintiffs sought the same information through expedited discovery prior to obtaining preliminary relief. The government objected to the burden of responding to both FOIA and discovery requests at the same time, and plaintiffs' counsel agreed to suspend all FOIA requests (*i.e.*, to withdraw them temporarily) while the government produced the documents in discovery. The trial judge never established a time table for discovery and never barred the private parties from using the FOIA; he simply told the parties to reach an agreement for expedited discovery.

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[311] The contractor was arguing that bad weather conditions closed the base and prevented the employees from working overtime.

[312] *See* California Canners and Growers v. United States, Cong. Ref. Case No. 2-77 (petition filed May 18, 1977) (FDA).

[313] Mandalay Shores Coop. Hous. Ass'n v. Pierce, 667 F.2d 1195 (Cir. 1982), *cert. denied*, 103 S. Ct. 446 (1983) (Department of Housing and Urban Development case).

[314] *But see infra* notes 370-71 and cases cited therein.

[315] For a description of this litigation, see Rheingold & Shoemaker, *The Swine Flu Litigation*, 8 Litigation, Fall, 1981, at 28.

2. *Parallel Use of the FOIA and Discovery in Criminal Cases in the Federal Courts.*—The Speedy Trial Act[318] affords criminal defense counsel so little time to prepare for trial that he cannot rely on FOIA requests to obtain relevant documents. Unless the trial court adopts the aberrational approach of ruling on FOIA requests,[319] defense counsel must use Rules 16 and 17 of the Federal Rules of Criminal Procedure to discover the documents he needs prior to trial.

The FOIA is nevertheless occasionally useful to defense counsel for investigation. Counsel may acquire information on the defendant's or a witness's background or about the federal facility where the offense allegedly occurred. Hospital and medical records and reports on safety conditions at a facility often contain useful background information. While defense counsel could seek these documents from the prosecutor under Rule 16 or from the agency under a Rule 17(c) subpoena, the materiality and evidentiary criteria in those rules may bar discovery if counsel is only looking for leads on defenses. Thus, in these cases counsel may use the FOIA as an investigatory tool.

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[316] This tactic is of limited utility because the agency can only invoke it when the party status of the requester is obvious from the face of the request. Agent Orange is a hot topic at present; and the Air Force receives, at its Pentagon headquarters alone, several FOIA requests per day for the release of records pertaining to Agent Orange. Unless the requester is one of the many counsel of record or a party in the Agent Orange class action, there is no way for the agency to know whether the requester is a party or is acting on a party's behalf. In fact, most Agent Orange requests are not litigation oriented but reflect the public's interest and concern on the matter.

[317] Friends of the Earth v. Weinberger, 562 F. Supp. 265 (1983).

[318] 18 U.S.C. §§ 3161-3174 (1982).

[319] *See supra* note 246.

3. Parallel use of the FOIA and discovery in agency adjudication.—The parallel use of the FOIA and discovery occurs most often in agency adjudication. Although the absence of provisions for formal discovery does not necessarily prompt parties to use the FOIA, perceived inadequacies in administrative discovery increase the parallel use of the FOIA. In many low-visibility proceedings the parties make little or no use of the FOIA.[320] In these proceedings, the issues are relatively straightforward, and the agency staff usually discloses its files despite the absence of formal discovery rules requiring it to do so.[321] Few issues of policy arise, and the agency only brings charges when the proof of a violation is particularly strong.[322] The respondents are usually small businesses whose counsel may not be as astute in the use of the FOIA as are counsel who represent larger economic interests before the FTC or the Commodity Futures Trading Commission (CFTC). Because of perceived deficiencies in administrative discovery, enforcement proceedings at the Department of Energy, the CFTC, and the FTC feature a heavy use of the FOIA. In those proceedings, most respondents either make FOIA requests during the proceeding or pursue requests that they made during the agency's investigation.

At the Department of Energy, the Economic Regulatory Administration commences an enforcement proceeding by issuing a proposed remedial order charging the respondent with a violation of the applicable price control regulations.[323] The respondent must file a Notice of Objection within 15 days and a Statement of Objections (in effect a combined answer and trial brief) within 40 days thereafter. To obtain discovery, the party must file a Motion for Discovery with the Statement of Objections. The motion "shall set forth the reasons why the particular discovery is necessary in order to obtain relevant and material evidence and shall explain why such discovery would not unduly delay the proceeding."[324] Because the interpretation of the applicable regulations is usually in dispute, respondents seek documents containing prior constructions by auditors, enforcement staff, and other agency officials. The Department's Office of Hearings and Appeals often affords respondents broad discovery on the prior construction of agency regulations and has permitted, despite the silence of the Department's procedural rules on this point, a second round of discovery motions.[325]

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[320] Examples include unfair trade practice proceedings under the Packers and Stockyards Act (Department of Agriculture), enforcement proceedings on the disqualification of stores from participation in the Food Stamp Program (Department of Agriculture), hazardous materials proceedings before the Materials Transportation Bureau (Department of Transportation), proceedings to resolve disputes over mineral and other public land claims before the Bureau of Land Appeals (Department of the Interior), and contractor and grantee debarment proceedings under federal housing programs (Department of Housing and Urban development).

[321] At the Department of Agriculture, the presiding officer may order the parties to exchange their witness lists and documentary exhibits, but he may not otherwise order them to produce documents. *See* 7 C.F.R. § 1.140 (1983). No discovery is available in the other proceedings listed *supra* note 320. *See* 49 C.F.R. §§ 107.315, 107.355 (1982) (Materials Transportation Bureau); 43 C.F.R. §§ 4.430 to 4.439 (Board of Land Appeals); 24 C.F.R. § 24 (1982) (Department of Housing and Urban Development debarment proceedings).

[322] Excepting only public land appeals, the agencies in these low-visibility proceedings charge the respondent with the commission of a specific wrongful or dishonest act.

[323] The procedural rules for enforcement proceedings are in 10 C.F.R. §§ 205.190-205.199 (1983).

Despite the Office of Hearings and Appeals' broad discovery orders, respondents are dissatisfied with the discovery they obtain for two reasons. First, they obtain no discovery before filing a Statement of Objections and Motion for Discovery. In the motion, the respondent must justify all its discovery requests at the same time. A potential respondent, on the other hand, may make multiple FOIA requests once he realizes that he is the subject of an investigation.[326] Second, respondents do not believe that the presiding officers are sufficiently independent to ensure that the respondent receives a thorough discovery search. The presiding officer too often accepts agency counsel's assertion that the agency has conducted a through search without permitting discovery on that issue. A dissatisfied FOIA requester, on the other hand, may obtain a ruling from a federal judge on the thoroughness of the agency's search.

At the CFTC and the FTC, respondents primarily use the FOIA to supplement their efforts to obtain factual materials in agency files. At both agencies, respondents routinely discover documentary exhibits; they also seek to discover factual material (*e.g.*, economic studies, witness statements) that the agency does not plan to present as part of its case-in-chief but which might help the respondent. At the CFTC, the presiding officer does not have authority to order the agency or any other party to produce relevant documents, and the respondent can therefore obtain these records only by making FOIA requests or by convincing the presiding officer to order the Division of Enforcement to disclose potentially exculpatory documents with the agency's case-in-chief.[327] Respondents have vigorously pursued both routes, but they have had greater success with the latter than with the former, which the agency has normally blocked by invoking exemption b(7)(A).[328]

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[324] 10 C.F.R. § 205.198(c) (1983).

[325] Atlantic Richfield, 5 DOE (CCH) ¶ 82,521 (1980) ("crude cluster" proceeding); Gulf Oil Corp., 8 DOE (CCH) ¶ 82,569 (1981).

[326] Because a FOIA request by the respondent normally precedes a discovery request for the same documents, the Department does not produce the documents a second time but simply informs the respondent what he has already obtained.

At the FTC the presiding officer does have authority to order the agency to produce relevant documents, but private practitioners believe that the Commission's administrative law judges have never become accustomed to ordering discovery from agency files. Consequently, the ALJs allow the agency to withhold as work product factual material that a district judge would order a party to produce. By seeking the release of these records under the FOIA, the respondent may obtain a more objective determination of whether the records are protected work product.[329] Once again, this route to additional discovery has not proved to be particularly fruitful; practitioners report that a respondent does not obtain many additional, relevant documents under the FOIA. But respondents continue to make FOIA requests if only to guarantee disclosure or to obtain the earlier release of documents.

When responding to a respondent's FOIA request, the FTC does not release exempt records merely because they are available in discovery. Of course, if the agency has produced the documents in discovery prior to the FOIA request, the public information officer may inform the respondent that the agency has already released the records to him. But the respondent cannot use the FOIA to augment the document discovery he has obtained under the Commission's rules or to obtain discovery which, although available under the rules, he has not sought.[330] This approach is supported by the pragmatic consideration that the agency's FOIA office, and the FOIA court on judicial review, should not rule on discovery issues,[331] but is subject to the objection that a FOIA release of discoverable records cannot possibly interfere with an enforcement proceeding.[332]

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[327] The Commission has required the Division to include all exculpatory or *Brady* material in the pretrial submission of its evidence under Rule 12.85. 17 C.F.R. § 12.85 (1983). *See supra* note 163.

[328] That trend will surely continue because section 222 of the Futures Trading Act of 1982, which appears to qualify as an exemption b(3) statute under the FOIA, allows the Commission to withhold from public disclosure "any data or information concerning or obtained in connection with a pending investigation of any person." Futures Trading Act of 1982, Pub. L. No. 97-444, § 222, 1983 U.S. CODE CONG. & AD. NEWS (96 Stat.) 2294, 2309.

[329] At the FTC, the General Counsel's office hears all appeals from initial denials. 16 C.F.R. § 4.11(a)(2) (1983). Initial denial authority belongs to the Secretary or, in the case of open investigatory files, to the bureau or regional office responsible for the investigation. 16 C.F.R. § 4.11(a)(1)(iv)(B) (1983).

[330] Heublein, Inc. v. FTC, 457 F. Supp. 52, 55 (D.D.C. 1978); Gifford-Hill & Co. v. FTC, 1975-2 Trade Cas. (CCH) ¶ 60.674 (D.D.C. 1976).

[331] For a case upholding this approach under the pre-1974 version of exemption b(7), see Williams v. IRS, 345 F. Supp. 591, 594 (D. Del. 1972), *aff'd*, 479 F.2d 317 (3rd Cir.), *cert. denied*, 414 U.S. 1024 (1973).

The IRS also has experienced the parallel use of the FOIA by taxpayers to discover relevant factual documents in investigatory files. Section 6103 of the Internal Revenue Code, which protects the confidentiality of tax return information, permits the Service to release information to a taxpayer only if it determines that "such disclosure would not seriously impair Federal tax administration."[333] In criminal matters taxpayers usually file FOIA requests during the special agent's investigation; in civil matters they file requests when the case is at the audit stage in the District Office, on appeal within the Service, or before the Tax Court. In criminal matters or civil fraud cases, the Service releases very few records—usually no more than correspondence with the taxpayer, records submitted by the taxpayer, or other "junk" items that are already known to the taxpayer. In other civil cases, the Service often releases a great deal, including the much sought after revenue agent's report (RAR). To determine what records to release, the disclosure officer contacts the agency official handling the case. These officials—the revenue agent at the audit stage, the appeals officer at the appellate stage, and the attorney representing the Service at the Tax Court stage—all have authority to release information in a taxpayer's file if they believe that doing so would advance the resolution of the controversy. If the official handling the case would disclose the RAR or other records, the disclosure officer will release them under the FOIA.

The Service's use of the FOIA to provide discovery to a taxpayer is necessary because the taxpayer, unlike the respondent in a FTC proceeding, does not have any right to formal discovery (*i.e.*, any access to discovery rules) during the early, informal stages of the adjudication. Discovery is available only when the case reaches the Tax Court and the parties have been unable to stipulate for the exchange of relevant documents.[334] An appeals officer, or a Service attorney in a Tax Court proceeding, might well expect some discovery from the taxpayer before he agreed to disclose an RAR. But because the Service's approach encourages taxpayers to use the FOIA to obtain the release of otherwise discoverable information without providing any quid pro quo, the availability of the FOIA for discovery purposes disadvantages the Service. Under its approach, the Service also must justify withholding records that normally would not be discoverable because of their deliberative, predecisional quality.[335]

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[332] *See* Campbell v. Department of Health and Human Servs., 682 F.2d 256, 259-65 (D.C. Cir. 1982) (release to third party requester of records available to the respondent does not interfere with enforcement proceedings; exemption b(7)(A) therefore inapplicable).

[333] 26 U.S.C. § 6103(e)(2)(1982). This statute qualifies as an exemption b(3) withholding statute. Chamberlain v. Kurtz, 589 F.2d 827, 838-39 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979). Other courts have gone further, holding that it supplants the FOIA and that a taxpayer may obtain access to tax return information (*i.e.*, to the investigatory file in his case) only in accordance with § 6103. King v. IRS, 688 F.2d 488, 495-96 (7th Cir. 1982); Zale Corp. v. IRS, 481 F. Supp. 486, 489-90 (D.D.C. 1979).

[334] The Tax Court has authority to order the Service to produce relevant documents, but it requires parties to make reasonable efforts to stipulate for the exchange of necessary documents before they invoke the court's discovery rules. TAX CT. R. PRAC. P. 70(a); *see, e.g.,* Branerton Corp. v. Commissioner, 61 T.C. 691 (1974).

H. The Use of the FOIA to Obtain Relevant Agency Records That Are Not Adequately Discoverable Because of External Limitations on Discovery

Various limitations on the availability of discovery may prompt a party to a proceeding to use the FOIA. Discovery is a mutual venture which takes time, and a party seeking speedy preliminary relief against the government may prefer to use the FOIA to obtain relevant documents rather than invoke the cumbersome civil discovery rules.[336] Similarly, the government, when it is a party to civil litigation, may obtain a protective order under Rule 26(c)[337] barring discovery during the pendency of a motion that would dispose of the action. A court will bar discovery pending the resolution of a dispositive motion if it finds that subjecting the government to discovery would be unreasonable and unduly burdensome.[338]

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[335] For example, appellate conference reports may not be exempt under the FOIA even though they generally are not discoverable.

One should not exaggerate the number of taxpayers who make FOIA requests. In 1982, the IRS received 12,538 FOIA requests, mostly from taxpayers. It denied 3,281 requests for technical reasons (no records, imperfect requests) and relied upon exemption b(3) and exemption b(7) to withhold records on only 1,510 and 920 occasions respectively. These figures indicate that only a small percentage of the taxpayers with tax controversies with the Service make FOIA requests. DEPARTMENT OF THE TREASURY, FREEDOM OF INFORMATION ACT ANNUAL REPORT TO THE CONGRESS 1 (1982).

[336] For an example of this use of the FOIA, see Council of Large Pub. Hous. Auth. v. Department of Hous. and Urban Dev., No. 82-1210 (D.C. Cir. 1982).

[337] FED. R. CIV. P. 26 (c)(i).

[338] For an example of the use of the FOIA to circumvent this limitation on discovery, see Copper and Brass Fabricators Council, Inc. v. Department of the Treasury, 524 F. Supp. 945 (D.D.C. 1981). In that case an association of copper producers challenged the Treasury Department's switch from a 95% copper penny to a penny that was almost 98% zinc. The plaintiff sought document discovery on the factual basis for the change. The Department, after moving to dismiss the complaint on the ground of the plaintiff's lack of standing, obtained a protective order barring further discovery pending the court's ruling on that motion. The plaintiff promptly resubmitted its Rule 34 discovery request in the form of a FOIA request to the Department's public information office. In that fashion, the plaintiff obtained most of the documents it had unsuccessfully sought in discovery, as the Department withheld only a limited number of records containing deliberative material. This use of the FOIA

Despite the attractiveness of the FOIA to a party barred from discovery by a protective order, parties rarely use the FOIA in this fashion.[339] Parties also rarely use the FOIA to obtain discovery after the time limits for discovery have expired. The Department of Health and Human Services reports that in title VII suits against the agency, employee plaintiffs occasionally use the FOIA to discover relevant documents when their counsel have neglected to make discovery requests within the time permitted. There are few other verifiable incidents of litigants' using the FOIA as a last-minute discovery option.

In judicial review proceedings in the federal courts, a party may use the FOIA for discovery because formal discovery is either not available or is quite limited. In statutory review proceedings in the courts of appeals, the applicable rules do not provide for discovery,[340] and the reviewing court's ill-defined and uncertain power to order discovery has been "sparingly used."[341] In nonstatutory review proceedings in the district courts, the civil discovery rules do apply, but review normally is limited, as it is in the courts of appeals, to the administrative record.[342] In these "administrative record" cases the government has sought to avoid any discovery or other fact-finding procedures, and the courts have permitted discovery only under certain specific exceptions to the general rule that limits review to the agency record.[343]

In administrative record cases, the government normally submits an index of the record to the reviewing court. If the action is in a district court, the party seeking review may request the government under Rule 34 to produce all the documents constituting the administrative record. What constitutes the administrative record is a matter of some uncertainty in informal proceedings (both rulemaking and adjudicatory) where the agency does not make a decision "on the record" as that term is used in the Administrative Procedure Act.[344] The record in-

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deprived the Department of some of the benefits of the protective order, although it ultimately won the lawsuit on the standing issue. Copper & Brass Fabricators Council, Inc. v. Department of the Treasury, 679 F.2d 951 (D.C. Cir. 1982). The protective order still spared the Department the burden of responding to interrogatories and depositions, and any coin collector enamored with the copper penny could have made an identical FOIA request.

[339] But for another case where the plaintiff resorted to the FOIA after the government obtained a protective order barring all discovery, see Cannon v. Marsh, C.A. 82-1479 (D.D.C. 1982) (plaintiff claimed breach of employment contract; government's successful motion to dismiss based on sovereign immunity defense).

[340] FED. R. APP. P. 69(b) speaks only of supplementing the record.

[341] Lead Indus. Ass'n, Inc. v. OSHA, 610 F.2d 70, 78 (2d Cir. 1979).

[342] *See, e.g.,* Camp v. Pitts, 411 U.S. 138, 142 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971).

[343] McMillan & Peterson, *supra* note 28, at 333-34.

[344] 5 U.S.C. §§ 553(c) and 554(a)(1982).

cludes all documents that the agency considered[345] or that influenced the agency in reaching its decision.[346] Privileged documents (*e.g.*, deliberative material, legal advice) are either not part of the record, or if considered part of the record, they need not be disclosed.

If the party challenging the agency action questions the completeness of the record that is certified by the government, the party can request discovery on that issue. Most district courts afford some document discovery on the completeness of the record, but such discovery is not normally available in a court of appeals. In either case, the FOIA provides an easier and more effective procedure for obtaining the relevant documents. If a FOIA request results in the release of additional documents, the party may move to supplement the administrative record. In *Center for Auto Safety v. Gorsuch*,[347] for example, the petitioners challenged the EPA's decision to allow General Motors (GM) to offset excess pollution generated by certain models against pollution savings on other models rather than to require GM to recall the offending cars. After obtaining a FOIA release of several factual documents that the government may have erroneously excluded from the administrative record, the petitioners requested the court of appeals to supplement the record.[348] Justice Department and agency attorneys do not object to this use of the FOIA because they receive notice of the records released under the FOIA before the requester can use them in litigation: there is no danger of surprise.

A party also may expand the scope of discovery by requesting a FOIA release of records in the possession or control of an agency that is not a party to the proceeding. If the proceeding is in federal court, the party also may seek the documents through the Justice Department attorneys representing the government, who may secure the voluntary cooperation of the agency, or through a third party subpoena served on the agency itself under Rule 45 or Rule 17(c). If the proceeding is before an agency, however, the adjudicating agency may not have subpoena power or its subpoenas may not be effective in prying documents loose from the files of other agencies. For example, when an administrative law judge at the FTC issued third party subpoenas to thirteen federal agencies in the Commission's antitrust proceeding against seven major oil companies, the Department of Justice argued that the Commission could obtain documents from executive branch agencies only by directing its requests to the President.[349] Largely agreeing with the Department, the Commission ruled that it would issue a subpoena to another federal agency only in the most compelling circumstances and only after a Commission request directed to the President had been denied.[350] Agency attorneys appearing before the Armed Services Board of Contract Appeals also report that they cannot extract relevant documents from nonparty agencies as effectively as do Justice Department attorneys. Although subpoenas are available to the parties, counsel often tell a contractor that a FOIA request to the custodian agency is an easier discovery technique.[351]

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[345] McMillan & Peterson, *supra* note 28, at 341-42.

[346] National Courier Ass'n v. Board of Governors of the Fed. Reserve Sys., 516 F.2d 1229, 1241 (D.C. Cir. 1975).

[347] No. 82-2032 (D.C. Cir. filed Nov. 9, 1982).

[348] The court of appeals will rule on the petitioners' motion to supplement the record when it decides the case on the merits. For a case in which a party to a review proceeding was permitted to supplement the administrative record with documents obtained through the FOIA, see Bethlehem Steel Corp. v. EPA, 638 F.2d 994, 1000-01 (7th Cir. 1980).

Despite the FOIA's usefulness when administrative discovery is unavailable, the Act is an inadequate substitute for effective discovery, and private parties are ill-advised to rely exclusively on the FOIA to obtain government documents. Department of Agriculture records, for example, are often relevant to new animal drug proceedings at the FDA, but the presiding officers do not have authority to issue subpoenas. A party to an FDA proceeding is nevertheless most likely to secure the timely production of Agriculture Department documents if he makes a showing of his need on the record before the presiding officer. In these cases, agency counsel are usually able to obtain the records from the Department.

As is clear from the discussion in this part, the uses of the FOIA as a discovery tool are many and varied. The FOIA is useful both as a supplement to and as a substitute for normal discovery techniques. A few of these uses of the FOIA disadvantage the government in litigation and are thus arguably abusive. Others impose little or no burden on the government other than the burdens associated with the usual FOIA request. Any proposal to correct the abuses must take into account both the legitimate uses of the FOIA and the peculiar circumstances of the illegitimate ones.

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[349] 15 U.S.C. § 47 (1982). Section 8 of the Federal Trade Commission Act instructs other government agencies to furnish records, papers and information to the Commission when directed to do so by the President.

[350] *Exxon Corp.*, Docket 8934 (Interlocutory Order June 30, 1980). The General Counsel's office reports that no other respondents have invoked this cumbersome procedure for discovering documents from nonparty agencies.

[351] Parties to grant proceedings before the Department of Health and Human Services also use the FOIA to obtain relevant Department of Labor records, preferring not to rely on the efforts of agency counsel or the subpoenas of the presiding officer.

IV. PROPOSALS TO CLOSE THE FOIA TO PARTIES TO PENDING PROCEEDINGS

A. Description of Proposals

In the fall of 1981, the Reagan Administration submitted to Congress a package of amendments to the Freedom of Information Act that included a provision intended to limit the use of the FOIA for discovery purposes.[352] The amendment bars a party to an "ongoing" proceeding, or any person acting on his behalf, from "making" or "maintaining" a FOIA request for records "relating to" the subject matter of the proceeding.[353] The closing of the FOIA is only temporary; once the proceeding is no longer "ongoing," a party may seek the release under the FOIA of records related to the proceeding. In support of the proposal, the Justice Department claimed that FOIA requests by parties to litigation divert government resources and impair the ability of the government to bring cases to trial.[354] Although the Department's section-by-section analysis did not address the issue, the Administration's draft not only closes the FOIA to persons engaged in litigation with the government, but also to persons engaged in private litigation. The latter limitation did not provoke any comment at the hearings before the Subcommittee on the Constitution of the Senate Judiciary Committee, but Senator Hatch (the subcommittee chairman) questioned the closing of the FOIA to a party to an agency adjudication if the agency did not have adequate discovery rules.[355]

In the fall of 1982, the Senate Judiciary Committee unanimously approved, as part of S. 1730, a somewhat narrower provision than that submitted by the Administration.[356] The Committee's bill did not come to a vote in the Senate during the 97th Congress but was reintroduced in the 98th Congress as S. 774. In June 1983, the Judiciary Committee unanimously approved S. 774.[357] Section 13 of S. 774 provides that the time limits prescribed for an agency response to a FOIA request "shall be tolled" whenever:

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[352] 1 *Hearings*, *supra* note 19, at 638-41 (text and section-by-section analysis of Administration's proposed amendments). The Administration's proposals were introduced as S. 1751, 97th Cong., 1st Sess. (1981).

[353] The full text of the provision reads as follows:

> A requester shall not make or maintain a request under this paragraph for records relating to the subject matter of any ongoing judicial or adjudicatory administrative proceeding (civil or criminal) to which the requester, or any person on whose behalf the requester acts in making the request, is a party.

1 *Hearings*, *supra* note 19, at 641 (section 2(b) of draft bill).

[354] *Id*. at 659-60 (section by section analysis).

[355] *Id*. at 635-36 (testimony of Assistant Attorney General Jonathan Rose).

[356] S. REP. NO. 690, 97th Cong., 2d Sess. (1982).

[357] S. REP. NO. 221, 98th Cong., 1st Sess. 6 (1983).

> 1) the requester, or any person on whose behalf the request is made, is a party to an ongoing judicial proceeding or administrative adjudication; and
>
> 2) the government is also a party to the proceeding or adjudication; and
>
> 3) the government may be requested to produce the records in the proceeding or adjudication.

The section then adds that it shall not be construed to bar:

> 1) a request for any records which are not "related to" the subject matter of the ongoing proceeding; or
>
> 2) a request for any records which have been denied to a party in the course of a judicial proceeding or administrative adjudication that is no longer pending.[358]

In support of this provision, the Judiciary Committee asserted that criminal defendants frequently use the FOIA to disrupt the prosecutor's case preparation and to delay trial. In addition, the Committee objected to the use of the FOIA to circumvent limitations on civil and criminal discovery.[359]

Under the Judiciary Committee's bill, the temporary closing of the FOIA is discretionary with the agency. Unlike the Administration's proposal, S. 774 permits a party to continue to make and maintain FOIA requests during litigation. The agency may, if it chooses, decline to process those requests because the time limits for responding "shall be tolled." Of course, the agency may respond if it chooses to do so. Once the litigation terminates, the time limits again begin to run, and a party may request any records that he did not obtain in discovery.

Another difference between S. 774 and the Administration's bill is that S. 774 only closes the FOIA to parties in litigation with the government who may request the government to produce the records in discovery. This latter modification reflects Senator Hatch's concern to keep the FOIA open to parties to agency adjudication when agency rules do not afford adequate discovery.[360] It is unclear, however, why the Committee also decided to require agencies to respond to FOIA requests made by parties to private litigation. The 1981 Hearings on the Freedom of Information Act before the Subcommittee on the Constitution[361] are replete with testimony that private litigants make such requests to discover competitors' trade secrets and other confidential business information. The subcommittee and the full Judiciary Committee responded by amending the FOIA to provide submitters of confidential business information with notice and an opportunity to be heard prior to an agency's release of records designated as confidential by the submitter.[362] But neither body explained why it declined to close the FOIA to parties to private litigation.

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[358] The text of the relevant part of section 13 of S. 774 reads as follows:

> B. The time limits prescribed in subparagraph (A) of paragraph 6 shall be tolled whenever the requester (or any person on whose behalf the request is made) is a party to any ongoing judicial proceeding or administrative adjudication in which the Government is also a party and may be requested to produce the records sought. Nothing in this subparagraph shall be construed to bar (i) a request for any records which are not related to the subject matter of such proceeding, or (ii) a request for any records which have been denied to a party in the course of a judicial proceeding or administrative adjudication that is no longer pending.

[359] S. Rep. No. 221, 98th Cong., 1st Sess. 29 (1983).

B. Objections to Proposals

There are three major objections to closing the FOIA to parties to litigation. First, the FOIA often provides private parties with speedier, more convenient access to government records than does discovery. Second, parties to litigation normally have a greater need for access to government records than do other persons for whom the FOIA would remain open. Third, there is no fair or rational way to enforce such a closing. In addition, temporarily closing the FOIA to parties to litigation will surely increase the already burdensome prelitigation use of the FOIA for discovery purposes.

With respect to the first objection, litigants who benefit from the availability of the FOIA include private litigants who seek government prepared accident reports, criminal defendants who are investigating possible defenses, respondents in agency adjudication who do not have access to formal discovery or who distrust the adequacy of the discovery available, parties in government litigation who seek records from nonparty agencies, and parties to judicial review proceedings who seek to verify the completeness of the administrative record. One might even add to this list parties who seek marginally relevant documents that are obtainable quite easily under the FOIA but only with difficulty in discovery. The Judiciary Committee's bill responds in part to these concerns by permitting an agency to continue using the FOIA to furnish parties with discovery if it chooses to do so.

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[360] *See Hearings*, *supra* note 19, at 659-60 (remarks of Senator Hatch).

[361] *See Hearings*, *supra* note 19.

[362] Both S. 1751 and S. 774 contain elaborate provisions protecting the rights of submitters from inadvertent or mistaken releases under the FOIA of confidential business information.

The second objection may be explained by a hypothetical. Let us assume that the FTC commences a precedent-setting enforcement proceeding against company X. Other, similarly situated companies become aware of the Commission's action and naturally are interested in learning as much as they can about the legal and factual bases for the Commission's new position. As potential parties to future enforcement proceedings, they may obtain under the FOIA all nonexempt agency records pertaining to the agency's new policy. Yet, inexplicably, under the Administration's and the Judiciary Committee's approaches, these same records are not available to the actual respondent, who of course is even more interested in their release. Prior to the 1966 amendments to section 3 of the Administrative Procedure Act,[363] a requester had to establish his interest in the matter in order to obtain agency records. The FOIA rejected this limitation in favor of "any person" access. To provide that a party's interest in a record now disqualifies him from obtaining access available to others is both retrogressive and unfair.

A possible response to this second objection is that the Administration's and the Judiciary Committee's approaches affect only the means by which a party obtains discoverable agency records. Neither proposal bars all FOIA requests by a party; a party still can obtain records that are "not related to the subject matter" of the proceeding through the FOIA. On the other hand, if the records are related to the subject matter of the proceeding, the party must obtain them through discovery.

This response is not convincing. As discussed above, discovery does not always afford a party the first level access to agency records available to the public under the FOIA.[364] For example, the government may block a party's discovery request for relevant documents by successfully raising a claim of privilege or by obtaining a protective order barring discovery prior to the court's ruling on a dispositive motion. Under the Administration's proposal, the FOIA is unavailable to the party because of his status as a party, and under S. 774, the agency may close the FOIA to the party if he can "request" the government to produce the records in the ongoing proceeding. Apparently it does not matter in either case that the discovery request has been or will be denied. The party's "remedy" if a denial occurs is to make a FOIA request after the litigation terminates, when the party no longer needs the records for litigation purposes.[365] Although it may appear unseemly for a party to use the FOIA to circumvent restrictions on discovery, it is indefensible to bar a party, even temporarily, from obtaining agency records available under the FOIA to other requesters. In addition, this circumvention should not occur very often because in the great majority of cases discovery affords better access to agency records than does the FOIA.

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[363] 5 U.S.C. § 552(c) (1964).

[364] *See supra* text accompanying notes 23-24.

[365] The discovery provision in of S. 774 § 13 provides that it shall not be construed to bar a request "for any records which have been denied to a party in the course of a judicial proceeding or administrative adjudication that *is no longer pending*." (emphasis added).

The argument that discovery provides a party with an adequate substitute for the FOIA is even less convincing when one takes into account what records a party must seek through discovery (records that are "related to the subject matter" of the pending proceeding).[366] Only if the phrase "related to" means "relevant" is the closing of the FOIA no broader than the corresponding access in discovery. But it is not at all clear that "related to" and "relevant" are synonymous.

The legislative history of the proposed amendments establishes that their proponents contemplate that the "related to" limitation would do more than bar parties from obtaining relevant documents through the FOIA. The phrase "related to" first appeared in the Administration's 1981 draft bill to amend the FOIA.[367] The Justice Department's accompanying section-by-section analysis argued that criminal defendants and civil litigants used the FOIA to "circumvent" the discovery limitation that an agency need honor requests for "relevant" information only if "compliance with the request would not be unreasonably harassing, oppressive or burdensome."[368] The Judiciary Committee's section-by-section analysis of S. 774 makes the same argument in almost identical language.[369] Circumvention of discovery restrictions is thus the evil to be remedied by the new legislation, and that goal can only be accomplished if an agency can deny a party's litigation related FOIA request when compliance would be "unreasonably" burdensome or would result in the release of irrelevant records. If the drafters of S. 774 intended to close the FOIA to parties seeking relevant, discoverable documents, they could very easily have said so. Thus, it appears that records which are not "relevant" may still be "related to" a pending proceeding and therefore not available to a party under the FOIA or in discovery.

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[366] S. 1751, the Administration's bill, required a party to seek through discovery all records "relating to the subject matter" of a pending proceeding. *See supra* note 353. There is no discernible difference between "relating to" and "related to."

[367] *See* 5 U.S.C. §§ 553(c), 554(a) (1982).

[368] OFFICE OF THE ATTORNEY GENERAL, THE ADMINISTRATION'S PROPOSED AMENDMENTS TO THE FREEDOM OF INFORMATION ACT 8-9 (October 15, 1981).

[369]

> In civil cases, parties often openly use the FOIA to bypass discovery procedures or to circumvent discovery requirements that they show a need for the requested information, the relevance of the information to the case, and that compliance with the request would not be unreasonably harassing, oppressive or budensome. *See* FED. R. CIV. P. 26. Similarly in criminal cases, a defendant seeking discovery must demonstrate not only the relevance of the information sought, but also that the request is 'reasonable' and within the scope of criminal discovery. *See* FED. R. CRIM. P. 16(a).

S. REP. NO. 221, 98th Cong., 1st Sess. 29 (1983).

Such a rule would produce inequitable results. For example, in *Bethlehem Steel Corp. v. EPA*,[370] a citizen's enforcement action brought by Bethlehem to compel the EPA to promulgate new rules, Bethlehem sought discovery on the agency's regulation of the steel industry under the Clean Air Act. As of late 1983, the government had resisted discovery on the grounds that the information sought was irrelevant. The presiding master rejected the government's efforts to limit the scope of discovery but also refused to order it to produce the documents requested by Bethlehem. The impasse in discovery encouraged Bethlehem to make FOIA requests and to file FOIA suits to enjoin the withholding of these records.[371] The EPA released many responsive records while claiming that many others were exempt even under the FOIA. If S. 774 were law, the EPA could have argued that Bethlehem's discovery request for the records established that the records were "related to the subject matter" of the pending litigation and hence need not be released to Bethlehem under the FOIA. If, on the other hand, FOIA courts interpret "not related to" to mean "not relevant," then S. 774 would afford EPA no relief and fail to accomplish its essential purpose—preventing the "circumvention" of discovery restrictions. The use of the FOIA for discovery purposes is not nearly as burdensome from the agency's perspective as is a FOIA request for a large mass of irrelevant documents.

The final objection to the closing of the FOIA to parties to litigation is that the closing is, at worst, unenforceable and, at best, not enforceable in any fair or rational fashion. The legislative history of S. 774 indicates that the language restricting FOIA requests by parties to litigation and persons acting on their behalf "authorizes each agency to require requesters to identify the persons on whose behalf the requester is acting in making the request."[372] Agency regulations therefore could require a requester to certify whether he is a party to a proceeding or making the request on behalf of a party to a proceeding, thus deterring the use of strawmen to make FOIA requests.[373] Nevertheless, the ambiguity of the phrase "on behalf of" raises serious problems, as does application of the FOIA access restriction to persons or organizations who make FOIA requests for many different purposes.

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[370] Bethlehem Steel Corp. v. EPA, No. 83C 7939 (N.D. Ill. Dec. 2, 1983).

[371] Rothhaar v. EPA, I.P. 83-123-C (S.D. Ind.) (Nov. 16, 1983)(agency granted summary judgment); Tabler v. EPA, I.P. 83-168-C (S.D. Ind.) (Sept. 23, 1983)(dismissed without prejudice on Tabler's motion).

[372] 2 *Hearings*, *supra* note 19, at 45 (subcommittee's section-by-section analysis of what is now section 13 of S. 774).

[373] Ethical constraints would deter most attorneys from participating in such schemes,

A FOIA requester clearly is acting "on behalf of" a party if the party asks him to make the FOIA request. But what if the FOIA requester seeks agency records to inform the public and is willing to make the records available to any one who asks for them? It should be clear that, if he makes the request on his own initiative and for his own purposes, he is not acting on behalf of the persons to whom he subsequently distributes the records. The answer becomes less clear, however, if there were some prior contact between the FOIA requester and the party to litigation, or if they share an interest in changing government policy.

These difficulties become clearer when the "on behalf of a party" standard is applied to an actual case. In *Orantes-Hernandez v. Smith*,[374] for example, the plaintiffs are Salvadoran refugees seeking political asylum in this country. As of early summer 1983, the plaintiffs were seeking discovery from the Department of State of documents pertaining to political conditions and human rights in El Salvador. At the same time, the Center for National Security Studies was seeking basically the same documents under the FOIA. Although the Center made its initial FOIA request prior to the Salvadorans' lawsuit, the Center maintained its request, and the Department responded to it, during the pendency of the *Orantes-Hernandez* litigation.[375] There were many entirely proper contacts between the Center's lawyers in Washington and the lawyers for the Salvadorans in California, and the Center evidently made available to the Salvadorans' lawyers some of the records it obtained under the FOIA. On these facts, is the Center acting on behalf of the Salvadorans? If the Center certifies that it is not seeking the records on behalf of a party to litigation, may the government challenge the certification by asking about prior contacts between the Center and the Salvadorans and about the Center's plans for sharing the records? A certification requirement does not mean much if it cannot be challenged, but challenges will involve courts and agencies in investigating cooperation between private litigants—a matter that is really none of the government's business. Even if an agency did not adopt a certification requirement, it still would be authorized to toll the time periods for

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and any use in the pending proceeding of records obtained through the FOIA most likely would expose the false certification.

[374] 541 F. Supp. 351 (C.D. Calif. 1982).

[375] Peterzell v. Department of State, C.A. 82-2853 (D.D.C. filed Oct. 3, 1982). As of late 1983, the State Department was preparing a *Vaughn* index covering the records withheld by it and already had released many responsive records.

responding to FOIA requests made on behalf of a party to litigation. If the requester challenged a tolling determination, then the agency would need to conduct some sort of proceeding to find the facts before applying the ambiguous "on behalf of a party" standard.

The difficulty in applying a certification requirement to requests by the parties themselves is not one of ambiguity but of overbreadth. Industrial giants like GM, and public interest organizations like the Center for Auto Safety, are almost always involved in litigation with the government. If GM or the Center for Auto Safety makes a FOIA request for records pertaining to auto safety, it is almost inevitable that those reocrds will be "related" in some fashion to a pending proceeding to which the requester is a party, perhaps a low-visibility administrative proceeding before the National Highway Traffic Safety Administration. The employee who makes the FOIA request on behalf of the organization may be completely unaware of or uninterested in the pending litigation. The phenomenon of the left hand not knowing what the right hand is doing applies to many large organizations.

It might be argued that a law permitting the temporary closing of the FOIA to parties to pending proceedings would not be overbroad if it were construed in light of its purpose—to bar the use of the FOIA as a supplementary discovery device. On this reasoning, the FOIA would remain open to a requester who is seeking agency records to plan company activities or to support a lobbying effort. Perhaps that result is consistent with the purpose of the bill, but the language of S. 774 requires a contrary result. Unless the requested records are unrelated to the subject matter of pending prodeedings, the agency may decline to process a party's FOIA request during the pendency of that proceeding. If, therefore, the records are "related to" the proceeding, the requester's purpose in seeking their release is irrelevant. Evidently, the drafters of S. 774 contemplate that the left hand may always find out what the right hand is doing.

Thus, if agencies implement S. 774 through a certification requirement, employees must ask their employers' lawyers about pending litigation before making a FOIA request on behalf of the employer. If the records an employee seeks are "related to" a pending proceeding, he must certify as to the employer's party status, and the agency then may delay processing the request by invoking the new tolling provision. Thus, not only would a temporary closing of the FOIA be overbroad, but it would almost force private entities to centralize their procedures for making FOIA requests. Some large organizations (chiefly businesses) already have done so by requiring a high official to approve all FOIA requests made on behalf of the organization. But some businesses and most public interest groups allow employees more discretion in making FOIA requests, and they should not be forced to adopt a more centralized, cumbersome procedure.

C. An Alternative Prosposal

The chief disadvantage of prior proposals to deal with the abuse of the FOIA for discovery purposes is that they deprive litigants of the timely first level access available to everyone under the FOIA. Congress should consider requiring a party in litigation with the government to notify government counsel of all discovery motivated FOIA requests. By amending the FOIA in this fashion, Congress can protect the government from the abuses of the FOIA which do occur without depriving litigants of equal rights under the Act.

A notice requirement limited to discovery motivated FOIA requests would not impose a significant burden on a party in litigation with the government. To comply with the notice requirement, a party's counsel need only mail a photocopy of each request to government counsel; the filing of a certification with the agency's FOIA office would be unnecessary. If an employee of a party seeks the release of agency records for nonlitigation purposes (*e.g.*, planning or lobbying purposes), then the employee need not notify government counsel of the request. More importantly, the employee need not even determine whether the requested records are related to pending litigation between the employer and the government.

Although fairness dictates that government counsel should receive notice if an opposing party is using the FOIA for discovery purposes, existing procedures do not ensure that he will receive notice. Government counsel might obtain information about a party's FOIA requests through discovery, but that disclosure may come too late to be of much value. Furthermore, the requester may seek to block disclosure by claiming work-product protection. Although advance notice of FOIA requests may make it easier for government counsel to become involved in the FOIA release decision and thus deprive a party of a nonadversarial (and perhaps more generous) response to the request, parties still should receive the minimum level access to which they are entitled under the Act.

The suggested notice requirement should also lighten the government's disclosure burden by permitting government counsel to eliminate duplicative searches and releases. An agency need not release records under the FOIA that the agency already has produced, or is producing, in discovery. The FOIA only proscribes the improper "withholding" of agency records,[376] and the definition of "withholding"—significantly impairing a requester's ability to obtain records or significantly increasing the amount of time a requester must wait[377]—affords agencies considerable leeway in responding to FOIA requests. An agency has not improperly withheld a record if the agency has made the record available to the requester in discovery.[378] On the other hand, if the FOIA request precedes any discovery request, then the agency must respond to the FOIA request in the normal fashion but it need not produce disclosable documents a second time in discovery.

Because a discovery search is normally more intensive than a FOIA search,[379] government counsel's authority to avoid duplicative searches is not as clear as the authority to avoid duplicative releases. If an agency has conducted a discovery search prior to a FOIA request, the FOIA does not require an additional search for the same records unless there is reason to believe that the discovery search did not produce all responsive agency records or that the agency has acquired additional responsive records subsequent to the discovery search. (A FOIA search must only be calculated reasonably to uncover all relevant documents; although additional responsive documents conceivably may exist, an agency need only conduct a reasonable search.[380]) The agency's public information officer may limit any subsequent FOIA search to files not searched during discovery, but the information officer's superior knowledge of the agency's record keeping systems—knowledge which often leads him to uncover records missed during a discovery search—still benefits the FOIA requester. On the other hand, if the FOIA request precedes a discovery request, the agency should conduct both a normal FOIA search and a discovery search. The agency can nevertheless reduce the burden of the discovery search by maintaining accurate records on the scope of the FOIA search and on the records released.

Another means to avoid the disruption of the government's trial preparation when it must respond to discovery motivated FOIA requests would be to allow the government to respond to these requests before the court or agency in which the proceeding is pending.[381] Nevertheless, there are serious drawbacks to this untested approach. Litigation is already an overly complicated affair. To inject FOIA issues into all judicial or administrative proceedings in which the government is a party would complicate the proceedings still more, exacerbating the well-documented problem of delay in our courts.[382] The disruption caused by discovery motivated FOIA requests is not serious enough to warrant further disruption of the litigation process. In addition, assigning FOIA issues to the discovery court could dilute a party's rights under the FOIA. The discovery court will naturally focus on the documents that it believes the party needs for trial or hearing; discovery standards will inevitably take precedence over FOIA standards. Parties to litigation therefore may receive less favorable treatment than other FOIA requesters. Although consigning a party to discovery for vindication of his FOIA rights is better from the party's perspective than closing the FOIA to him altogether, the adverse effect upon the justice system mitigates against this option.

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[376] *See* Kissenger v. Reporter's Comm. for Freedom of the Press, 445 U.S. 136, 139 (1980).

[377] *See, e.g.,* McGehee v. CIA, 697 F.2d 1095, 1110 (D.C. Cir. 1983).

[378] *See* Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969), in which the court held that the agency's disclosure of records to the FOIA requester in discovery mooted the FOIA requester's lawsuit. *Id.* at 1340.

[379] *See supra* text accompanying notes 64-74.

[380] *See* Weisberg v. Department of Justice, 705 F.2d 1344, 1357 (D.C. Cir. 1983); Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982) (per curiam). Although in both *Weisberg* and *Perry* the reasonable prior search was a FOIA search, the same principle should apply to a reasonable prior discovery search.

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[381] The trial court or agency could apply FOIA standards to resolve FOIA issues.

[382] Accordingly, the Department of Justice always tries to prevent discovery courts from considering FOIA issues.

STATEMENTS OF THE
ADMINISTRATIVE CONFERENCE
OF THE
UNITED STATES

STATEMENT 9: GUIDELINES FOR CHOOSING THE APPROPRIATE LEVEL OF AGENCY POLICY ARTICULATION

(Adopted June 10, 1983)

The Administrative Conference continues to support the general principle, stated in Recommendation 71-3, that "agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible." Without endorsing every particular conclusion expressed therein, the Conference believes that the appended statement of its Committee on Judicial Review and the supporting report of its consultant suggesting considerations and guidelines for choosing the appropriate level of agency policy articulation will assist agencies in achieving these ends.

Appendix—Guidelines

Administrative agencies frequently must make decisions about how extensively and how clearly to articulate their policies. To assist agencies in making these difficult decisions, the Committee on Judicial Review of the Administrative Conference has identified and analyzed many of the considerations involved and offers the following guiding principles and conclusions.

In previous recommendations, the Conference has staunchly advocated the proposition that agencies should better articulate their policies. Recommendation 71-3 broadly proclaimed that "Agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible." Several more narrowly focused recommendations echo this sentiment. Recommendation 70-2 declared that the Securities and Exchange Commission should "to the maximum feasible extent state in the form of rules the legal interpretations, the policies, and the standards [applied] in determining registration obligations in the no-action process." Similar recommendations have been directed to the Immigration and Naturalization Service in change-of-status cases (No. 71-5), to the United States Parole Commission (No. 72-3), to the Labor Department in alien labor certification decisions

(No. 73-2), and to federal banking agencies (No. 75-1).

These recommendations reflect the Conference's general position favoring precision in administrative rulemaking--agencies should articulate their policies in a form that evokes a uniform interpretation in the minds of the affected parties. Such precision provides greater guidance to members of the public in planning their conduct, enables agency officials to control the quality and consistency of agency decisionmaking, reduces the costs of resolving disputes, provides persons threatened with adverse outcomes a more meaningful opportunity to participate in the decisionmaking process, facilitates judicial review of agency action, and facilitates political review of agency policy.

Despite these benefits, subsequent study of the abovementioned programs, along with other case studies, suggests that there remains an ingrained resistance among some agency administrators to extensive policy articulation. In some instances, this may be due to inertia or mere neglect. But in other programs, our study suggests that the precision with which agencies articulate policies reflects conscious choice based upon a belief that specificity comes at too high a cost in regulatory complexity or inflexibility.

More specifically, an agency's choice whether to adopt a specific or vague verbal formulation can have an impact in four general areas:

— Noncompliance costs: the impact of the rule on the rate of compliance by the regulated population. This will be influenced by the ease with which a rule's addressee can determine how the rule will apply to his intended conduct and the likelihood, as perceived by the addressee, that the rule will be enforced in his case.

— Misapplication costs: the social costs resulting from overinclusiveness—application of a rule to circumstances where it is not appropriate—or underinclusiveness—failure to apply the rule to circumstances where it is appropriate. A clear rule will produce such errors if it is inaccurately drafted, including within its reach either more or fewer situations than necessary to achieve the policymaker's goals. On the other hand, a more accurate rule, if vague, may be erroneously applied in practice because it is more susceptible to misinterpretation.

— Rulemaking costs: the costs of obtaining and evaluating the information necessary to develop a rule or policy.

Writing a precise rule usually requires considerable initial rulemaking costs. A vaguer policy may produce greater rulemaking costs later, including the need to explain decisions in individual cases and to maintain quality control mechanisms, and possibly the cost of subsequent legislative rulemaking to clarify the policy.

-- Rule application costs: the transaction costs of enforcing the rule, which will be affected by the size of the regulatory program, the rate of compliance, the number of disputed issues, and the formality of the applicable procedures. This category also includes the resources expended by the regulated population in determining whether and how a rule will apply to their activities and planning for compliance.

Once it is acknowledged that the drive for increased regulatory specificity is subject to some limit, then advice-giving becomes more difficult. In the hope of assisting administrative agency policymakers to achieve the elusive optimum level of policy articulation, this statement discusses particular examples of agency policies demonstrating varying levels of precision and identifies conclusions about regulatory specificity that can be drawn from these examples.

Examples of Differing Levels of Agency Policy Articulation

A. The Federal Aviation Administration's Age-60 Pilot Retirement Rule

The Federal Aviation Administration's (FAA) rule providing that no individual 60 years of age or over shall pilot any commercial flight, adopted pursuant to its statutory authority to promote flight safety, is a model of precise policy articulation. The rule is extremely clear and simple.

Since the rule was first adopted, the FAA has withstood considerable pressure to amend it. The rule has been upheld on court appeal as has the agency's absolute refusal to grant exemptions or waivers. The agency itself has frequently promoted research to determine whether a more individualized standard could be developed. However, none of these efforts have come to fruition. The most recent study concluded that there is still no better alternative than the age-60 rule.

The age-60 rule applies to a relatively small group of people whose activity is very visible, and the airlines help the FAA to enforce the rule. Thus a precise rule is not really necessary to promote compliance. It does, however, produce a considerable savings in dispute resolution costs. A discretionary retirement standard would require an elaborate procedure for determining individual cases, including expensive hearings and appeals for resolving disputes. On the other hand, the clear rule has hidden rulemaking costs—the expense of the frequent attacks on the rule and requests for waiver.

The age-60 rule carries an obvious risk of overinclusiveness, prohibiting many pilots in their 60's, who may still be fit, from flying. The FAA acknowledged this problem in adopting the rule, but noted that there is a general correlation between advancing age and deteriorating capacity to fly, and that sophisticated testing methods that would permit more individualized measurement of ability did not exist. The FAA apparently determined that the social cost of overinclusiveness in this case (the harm to older pilots and the cost of training replacements) is low compared with that of an underinclusive rule (the risk of airline accidents). Salary and benefit packages that take the age-60 retirement rule into account have reduced the cost of overinclusiveness.

B. "Safe Harbor" Rules for Resale of Unregistered Securities

The Securities Act of 1933 prohibits the public sale of securities for which no registration statement has been filed with the Securities and Exchange Commission (SEC), but permits private offerings of unregistered securities. The resale of these unregistered securities is illegal if the seller is an "underwriter," someone who has purchased "with a view to . . . the distribution" of the security.

In implementing the "underwriter" provision, the SEC has moved from unarticulated standards to very specific ones. Formerly, the agency issued "no-action" letters, promising no enforcement action with respect to particular transactions, based on review of the individual facts. Facing increasing pressures to clarify its policy, the SEC adopted the "safe harbor" rules, under which transactions meeting five highly objective criteria are exempt from the registration requirement. Proponents of exemption for transactions not meeting the criteria must bear a substantial burden of proof. Since the SEC will no longer issue no-action letters on this subject, the safe harbor rules provide the only opportunity to resell unregistered securities without substantial risk. The rules have been revised frequently, and seem to be evolving toward a simpler test based on one of the five criteria, length of ownership.

The safe-harbor rules were designed to reduce enforcement transaction costs by eliminating the need for no-action letters.

Since the no-action process was efficient and simple, however, the savings for the agency may not be significant. On the other hand, the savings in legal fees to private parties hoping to resell their unregistered securities have probably been more substantial. The total savings in transaction costs have been offset somewhat by the costs of the frequent rule revisions; however, the net effect has probably been favorable.

Since the no-action process was highly centralized, the adoption of precise rules probably has not produced substantial quality control improvements. Moreover, precision is not really necessary to promote compliance. Lawyers and brokers involved in these transactions are generally "repeaters" with substantial reputational interests to protect.

In adopting the safe-harbor rules the SEC hoped to protect innocent purchasers by reducing the underinclusiveness of the existing no-action system. The original version of the rules, however, was so restrictive as to discourage capital formation and so complex as to nullify some of the intended reductions in transaction costs. With its subsequent amendments to the rules, the SEC is moving toward a better balance of precision, accuracy and complexity.

C. Disability Determinations in Social Security Cases

The size and impact of the Social Security disability rules are much greater than those of the previous examples; in 1980, 1.2 million people applied for benefits. The system for determining eligibility for disability benefits is very decentralized, including initial determinations made by state agencies and several levels of administrative and court review.

Since the program began in 1956, the definition of disability has grown increasingly precise. The Social Security Administration's (SSA) first definition of disability was short and general, enumerating some factors to be considered in making the determination and listing nine vaguely described impairments that would ordinarily be considered disabling.

A rule revision in response to a 1967 statutory amendment added a more detailed and objective "medical appendix" that defined threshold impairment levels for presumptive disability. While subsequent amendments continued this trend toward greater precision, the relationship between medical impairments and the ability to perform "substantial gainful activity" (the test of whether a claimant's disability prevents him from working) remained obscure. SSA strove to remedy this in 1978, with a five-step series of questions designed to resolve easy cases on the basis of single factors and ending with a medical-vocational grid defining relationships among four variables (exertional capability, education, age, and work experience) to predict outcomes for the most difficult cases.

Two factors have led to this trend--the high costs of processing claims in a large and growing program with a multi-level appeals process, and the difficulty of controlling subordinate decisionmakers in a highly decentralized system. The price paid for greater clarity, in rulemaking costs, misapplication costs, and complexity, has not been high. Since claimants are entitled to a clear explanation for individual decisions, SSA's initial rulemaking expenditures have saved potentially far higher costs later in the process. Although application of the rules results in some erroneous outcomes, this cost is acceptable because the misclassifications occur near the border between the disabled and the not disabled. And in this instance, the complexity of the rules does not significantly drive up rule application costs, since most individual cases involve only a few contested issues. Thus the choice of greater precision appears sound.

D. Labor Certification of Immigrant Aliens

Under U.S. immigration law, aliens may not enter the country in order to work unless the Secretary of Labor has certified that qualified domestic labor is not available and that the employment will not adversely affect the wages and working conditions of similarly employed U.S. workers. The Secretary initially promulgated rules containing two lists—one of undersupplied jobs for which certification would be automatic, and another of oversupplied jobs for which certification was precluded. These categories provided great clarity in the easy cases. Decisions on the "availability" of workers in unlisted occupations were based on regional office guidelines specifying the use of general labor market data for the local area.

After the labor market data approach was rejected by some reviewing courts, an overhaul of the rules in 1977 established a new availability test based on individual recruitment efforts by the prospective employer. The rules described the necessary efforts in great detail. Despite their detail, the 1977 rules raised many new questions of interpretation and were criticized by employers as too rigid and costly. The result of these complaints was another revision in 1980.

These efforts have had mixed success in reducing the program's high transaction costs. The volume of cases is quite large. While the number of applications fell after adoption of the 1977 rules and the rate of certification rose, the time spent on each case also rose, in part because of the substantive change in the availability test and in part because of the rules' increased complexity. The rules were somewhat more successful in promoting consistency in a highly decentralized system, and the 1980 amendments continued this trend.

The potential for compliance problems in this type of program is high—both workers and employers may have strong incentives to violate the law, and the regulated activity is dispersed and inconspicuous. This is an additional reason to provide clear standards.

The resulting misapplication problems have been held in check. Concern about overinclusiveness prompted some easing of the employer recruitment requirements in 1980. Although the rules have not been wholly successful at discouraging employers from making only superficial recruitment efforts, the oversupply schedule protects the most common jobs and the certification process effectively protects domestic wage rates.

E. Parole Release Guidelines

As it existed in the late 1960's, the federal parole release process was very close to a pure example of official discretion. On the basis of an interview with the prisoner, Parole Board members would decide whether to release the prisoner, offering no reasons for their decision. Implementing an extremely vague statutory standard, Board rules listed 33 very general factors to be considered in making decisions.

In 1971, the Board (which became the Parole Commission in 1976) adopted more precise guidelines for parole release. It established two indices measuring the severity of the inmate's offense and the probability of recidivist behavior and identified a range of detention periods appropriate for each combination of characteristics. By specifying a range of detention periods and permitting decisionmakers to deviate from the applicable ranges, the guidelines leave considerable room to individualize parole release decisions. Nevertheless, adoption of the guidelines represented a quantum leap in the precision of the Board's policy. The result has been praised for increasing the fairness of the parole system. The guidelines have undoubtedly improved the quality and consistency of the decisionmaking. They may also have increased the degree to which Board decisions accurately reflect the probability of future antisocial conduct, but this hypothesis cannot easily be tested.

These gains have, of course, been achieved at a price. Rulemaking costs have been high and are continuing because the guidelines have been modified frequently. By comparison, the previous approach involved no significant rulemaking costs. Nor did the guidelines significantly reduce the cost of handling parole applications. Since the cost to prisoners of applying is almost zero and the potential reward is great, almost all prisoners apply for parole, whether or not the guidelines suggest that their efforts will be futile. Moreover, the cost of decisionmaking, very low before adoption of the guidelines, has not been reduced by their adoption.

The guidelines can have little impact on compliance behavior. They do not concern behavior during incarceration, and it is unlikely that the original behavior leading to incarceration would be influenced by parole release guidelines, which are probably unknown to the potential criminal in any event.

Thus, the guidelines provide a modest gain in decisional consistency, an uncertain impact on decisionmaking accuracy, and a modest loss in rulemaking and processing costs. Their main benefit may be that they significantly increase the perception of fairness and justice of the parole release system—a value hard to quantify within the context of a cost-benefit study.

F. Bank Chartering by the Comptroller of the Currency

The Office of the Comptroller of the Currency (OCC) grants charters to national banks following the mandate of the National Bank Act of 1864, which contains only the most general substantive standards for granting charters. Over the years, chartering policy has been alternately restrictive and liberal, depending on political and economic conditions. This history has firmly established the principle that the Comptroller retains discretionary control over entry.

Until 1976, Comptrollers made very little effort to articulate precise criteria for chartering decisions, either by rulemaking or in individual decisions. A 1976 policy statement described the Comptroller's goals in bank chartering and identified several relevant factors, but contributed only modestly to regulatory precision. Only a few factors involved anything approaching bright-line tests, and many were subjective or conclusory. Moreover, the Comptroller reserved the right to depart from the policies set forth in the statement. A revised statement issued in 1980 clarified some aspects of the policy, but simultaneously made others more obscure.

Bank chartering is an area where highly specific substantive standards may not be warranted. Accepting that the primary goal of entry restrictions is to maintain public confidence in banking by reducing the risk of failure, it is probable that *per se* rules will produce high misapplication costs, since the likelihood that new entry will cause injury depends on variable market factors and changing economic conditions.

Moreover, since the chartering rules concern themselves with the status and qualifications of applicants rather than the modification of behavior, greater precision would be unlikely to induce compliance. While clearer standards might encourage more applications by reducing the cost of applying, there are more direct ways of achieving this goal when circumstances in the banking industry warrant it.

The number of applications received is small, and the procedure for handling them informal. The courts and Congress have resisted pressures for more expensive and elaborate procedures. Thus the transaction costs of opaque standards are not high. A high degree of centralization also reduces the need for more precise rules to maintain quality control.

Since the costs of an over- or underinclusive rule would be very high, rulemaking efforts would have to be elaborate and expensive in order to develop more specific rules that were also acceptably accurate. In the context of a system like that of bank chartering, the benefits of greater precision would probably not justify that cost.

G. Penalty Standards for Hazardous Materials Transportation Act Violations

The Hazardous Materials Transportation Act of 1975 authorizes the Secretary of Transportation to designate materials whose transportation may pose safety hazards and to promulgate regulations for the safe transportation of such materials. The Act's chief enforcement provision authorizes the Secretary to impose civil penalties of up to $10,000 per violation for knowing violations of the Act or regulations, after notice and hearing. The statute identifies factors to be considered in determining the appropriate penalty, such as the nature and seriousness of the violation, prior offenses, and ability to pay. The Secretary has delegated this enforcement authority to the units within the Department of Transportation that regulate the various modes of transportation.

The substantive regulations adopted to enforce the Act are extremely lengthy and detailed, specifying the exact method of compliance. By contrast, neither the Secretary nor the departmental units implementing the law have made much effort to control agency lawyers' charging and sentencing discretion through explicit instructions. This low level of precision has probably occurred because none of the factors that customarily lead policymakers to adopt precise rules operate with much force here. Transaction costs are low because caseloads are small and the penalties sought are usually low enough to discourage respondents from investing heavily in defensive tactics. Moreover, for four of the five departmental units, the prosecution function is concentrated within a very small group of attorneys located in a central office, and quality control has not been a problem. Reliance on regional staff has meant a larger problem maintaining consistency in Coast Guard proceedings.

Penalty standards might enhance compliance by communicating clearly the consequences of a violation. If the regulated population prefers to avoid risk, however, the uncertainty of the present situation might itself enhance compliance. In any event, since agency officials believe many violations are caused by the carelessness or ignorance of low-level employees, the cost of assuring compliance may exceed the cost of a violation. And because the probability of detection and punishment is small, even a clear penalty standard might not promote compliance significantly.

Most important, however, the discretionary penalty judgments provide an important counterbalance to the highly objective and inevitably overinclusive substantive regulations, allowing agency prosecutors to tailor the sanction to the precise circumstances of the offense and the offender. Thus the benefits of greater precision in this case would not be adequate to justify the resulting rulemaking costs and misapplication losses.

H. Alien Change-of-Status Determinations

Under the immigration laws, the Attorney General is authorized, in his discretion, to adjust the status of aliens in the United States to permanent resident status. The statute establishes fairly clear threshold criteria for the determination, such as legal admission into the United States and eligibility for an immigrant visa under applicable quotas. But the discretionary element remains vague, and the Immigration and Naturalization Service (INS), which implements the law, has done little to clarify it. While some positive and negative factors can be ascertained from reading INS decisions, there is no clear indication of how these factors will be applied in any particular case.

The generality of the standards applied to these cases has frequently been criticized for encouraging inconsistent results and political intervention. While the courts have generally upheld the broad discretion of the INS, they have done so with some reluctance.

In 1979 the INS proposed rules identifying five positive and five negative factors and some principles for applying them in individual cases. However, the factors remained vague, and the proposal offered no criteria for weighing them. INS withdrew the proposal in 1981 on the grounds that it could not anticipate everything that would be relevant in a particular case.

Although INS officials expressed the fear that rule clarification would increase litigation, the opposite seems more likely. Since applicants have a great interest in the outcome and possess multiple avenues for contesting denials, litigation costs are already high. The costs of initial rulemaking, moreover, would surely be offset by the reduced burden of explaining the reasons for decisions, and clearer standards would facilitiate quality control in a decentralized system where decisions are made in regional offices.

Clearer standards might also promote compliance, although this depends on the likelihood that the regulated audience is familiar with the rules. It also depends on the extent to which the standards in question are intended to induce particular behavior. Here the discretionary judgment may be designed more to recognize the existence or absence of a condition or status, rather than to influence conduct.

The INS apparently concluded that the statutory scheme requires the exercise of broad discretion in order to avoid the potential costs of over- or underinclusiveness. However, the only apparent objective of the discretionary judgment that does not readily lend itself to expression in a clearer rule is that of limiting status adjustment to persons likely to make a very positive contribution to society. Even this goal could be met within the open texture provided by an unweighted, nonexclusive list of factors like that proposed in 1979. The INS rules could probably be far more precise, thus reducing costs, while still retaining the flexibility necessary to make sensible determinations.

I. Comparative Renewal Broadcast Licensing Standards

The standards used by the Federal Communications Commission (FCC) to select among competing applicants for a broadcast license have remained obscure despite several major reform efforts. The Federal Communications Act and FCC regulations articulate fairly precise threshold criteria that must be met to qualify for a license. Choices among applicants who meet these criteria, however, are governed by policy statements whose efforts to clarify the applicable standards have been very modest.

These standards are particularly vague when one applicant in a comparative proceeding is an incumbent seeking license renewal. A 1970 policy statement governing these cases identified the incumbent's "past record" as the critical factor, with satisfactory service to the community entitling the incumbent to renewal regardless of the merits of the challenger's proposal.

Acknowledging the vagueness of this standard, the FCC opened an inquiry to determine whether quantitative programming standards (e.g., a certain amount of public affairs or local interest programming) should be used to define "substantial service." In 1977, after the D.C. Circuit had overturned the 1970 policy statement, the FCC closed its inquiry, concluding that quantitative program standards should not be adopted. Since that time, despite repeated criticisms and proposals, the FCC has not adopted any more specific standards for comparative renewal proceedings. Arguably, because of the variety of local needs and interests served by broadcasters, a uniform standard poses a high risk of inaccuracy. It was for this reason that the FCC concluded that quantitative programming standards would not necessarily improve broadcast service. An inaccurate rule that chilled freedom of speech, moreover, would be very costly. On the other hand, more precise rules might reduce transaction costs significantly. The present costs of individual hearings are very high because of the great value of a broadcast license and the formality of the procedures involved. Although the volume of hearings is low, the fact that applicants seldom challenge incumbent licensees' renewal applications may be largely a result of the imprecision of the standards and the consequent difficulty of predicting success.

The overriding factor in the FCC example is goal ambiguity. There is no national political consensus as to what constitutes "good" broadcast performance nor as to the role of government in promoting it. The agency cannot really be expected to articulate a more precise policy unless the underlying value conflict can be reduced.

Summary and Conclusions

These case studies demonstrate the wide range that exists in the degree of precision with which agencies articulate their policies. The FAA's pilot retirement rule is a paradigm of clarity. The SEC's safe harbor rules, the Social Security disability definition, and the alien labor-certification rules combine very clear criteria with vaguer elements. The parole release guidelines, while including a tight matrix of highly objective factors, leave even more room for the exercise of discretion. At the other end of the spectrum, the bank chartering rules, INS change-of-status policies, hazardous materials penalty standards, and FCC broadcast license renewal criteria provide very little guidance about the substantive decision factors.

The historical evolution of these policies demonstrates the prevalence of pressure to increase clarity; some agencies (INS, FCC) have strongly resisted this pressure, while others (SSA, SEC, Parole Board) have responded to it with policy revisions. On the other hand, the FAA example demonstrates that clear, simple rules can prompt pressure in the other direction, if they are perceived to be very over- or underinclusive.

The case studies demonstrate that agency policymakers should not always strive to achieve the maximum possible precision. Instead, they should decide how precisely to articulate their policies based on the nature of the regulatory program and the implications of their choices for the rate of compliance by the regulated population, the cost of rulemaking (both initially and in response to pressures to amend or waive the rule), the cost of applying the rule and of resolving disputes about its application, and the extent and impact of divergence between the outcomes actually produced by the rule and those intended.

The examples suggest some circumstances in which a heavy investment in initial rulemaking to increase the precision of a policy is likely to be justified: (a) when potential compliance problems loom especially large; (b) when the costs of applying a rule to specific transactions are likely to be high; (c) when the high cost of initial rulemaking is offset by the reduced cost of subsequent policy explanations, and (d) when the risk of misinterpretation of a vague rule is large relative to the risk that a clear rule will be over- or underinclusive.

Compliance Problems. Precise rules promote voluntary compliance because they are easy to understand and to enforce (as long as they are not too complex). Consequently, agencies should consider enhancing rule precision when efforts to increase the compliance rate are likely to be most important or effective. This occurs when the rule regulates conduct, rather than status. Rules that permit a choice of whether to comply or not include those that explicitly forbid or command particular actions as well as definitional rules, like the SEC safe-harbor rules, that help to distinguish between permitted and prohibited conduct.

Standards for the grant of a permission or privilege, on the other hand, often fall into the status-evaluating category; examples include the OCC bank chartering rules and the SSA's disability definition. An exception is standards for renewal of a scarce privilege, which may have significant behavioral objectives. FCC licensees, for example, undoubtedly comply more fully with agency rules because they fear nonrenewal.

Compliance problems are exacerbated if the rule's audience is large and relatively unsophisticated. Similarly, compliance will be a problem when the expected level of evasive behavior by the regulated population is high, because compliance is expensive (as with pilot retirement) or because noncompliance is easy to conceal (as with hiring illegal aliens). In these circumstances, increased clarity will promote voluntary compliance and simplify effective enforcement against violators.

Rule Application Costs. Increasing a rule's clarity should reduce the costs of applying it to specific transactions, including both the resources expended by members of the regulated population in planning for compliance with the rule and the resources expended by private interests and the government in the course of enforcing the rule. When these costs are likely to be high, a precise rule will be beneficial. Rules that regulate conduct will generate significant costs of planning for compliance, particularly when they affect a large volume of transactions or transactions with a high individual value. For example, potential resellers of unregistered securities will invest more heavily in rule interpretation than employers seeking labor certification for alien workers because of the greater value of the individual transaction.

Similarly, the higher the volume and value of regulated transactions, the higher the enforcement costs. The formality of the procedure for contesting an adverse decision will also affect the cost of enforcement. Increased clarity of rules should reduce these costs by simplifying both planning and enforcement.

Rulemaking Costs. Sometimes developing precise rules requires a substantial initial investment, in both research to anticipate the rule's impact and efforts to secure agreement among participants in the rulemaking process. This investment will be offset, however, by the extent to which a precise rule reduces the demand for subsequent policy clarification. When an agency will face frequent pressure—from the regulated population, courts, or its own enforcement staff—for explanations of the applicable policy, these subsequent rulemaking costs will be high. This will occur when dispute resolution procedures are elaborate and formal and the rule is administered in a decentralized manner; the Social Security disability program is a good example.

Misapplication. The most powerful argument against adopting specific rules is their unavoidable over- or underinclusiveness. But misapplication costs can result from vague rules as well, when they are erroneously applied to an inappropriate person or transaction. The risk that a rule will produce unintended results exists in either case, and there is no reason to believe that a more precise rule formulation will produce more errors or more costly errors. When the cost of errors caused by misinterpretation outweighs that of errors caused by inaccurately drafted rules, precision will be preferable to ambiguity. Programs administered on a highly decentralized basis, for example, have a high inherent risk of misapplication in practice which may justify clear rules.

Centralized review can reduce the errors in such a system, but is itself costly. Similarly, as in the FAA's pilot retirement rule, the risk that a rule will be inaccurate on its face may be worth taking when the cost of misapplication in an individual case (i.e., an airline accident) is especially high.

By contrast, errors resulting from inaccurate drafting are most likely when the scope of the rule is broad and the conduct regulated is heterogeneous or changes rapidly over time. For example, the Comptroller of the Currency has argued that bank chartering policy must be free to adjust to unpredictable changes in the economic climate.

In any event, the mere possibility of inaccuracy should be discounted if the cost of resulting errors is low or if techniques can be devised to confine their impact. Such techniques may include provisions permitting persons subject to a rule to seek a waiver, or a hierarchical system of rules that allows the elimination of extreme cases first, reserving closer cases for greater scrutiny. The disability definition and the labor certification rules are examples of such hierarchical systems. Rules that permit a range of outcomes, such as the hazardous materials penalty standards, are also likely to involve less significant costs of this type than those offering only an all-or-nothing choice.

STATEMENT 10: AGENCY USE OF AN EXCEPTIONS PROCESS TO FORMULATE POLICY

(Adopted December 16, 1983)

The Administrative Conference commissioned a study* of the Department of Energy's petroleum allocation and entitlements program as administered through an "exceptions" process by the Office of Hearings and Appeals. The program covered by the study applied to the petroleum industry from 1973 to 1981, a period characterized by rapidly changing conditions in the industry and several periods of emergency.

The Conference believes that the experiences of this particular "exceptions" process, while unique to this program in important respects, are worth sharing with the Congress and with those agencies that may administer a regulatory program—especially in the context of an emergency—in which individuals or classes seek waivers, exemptions, variances, or other particularized exceptions to rules of general applicability.**

The Regulatory Framework

The petroleum industry began to come under comprehensive federal regulation in 1970 with the advent of anti-inflation controls. In the Emergency Petroleum Allocation Act of 1973 Congress mandated a program of price and allocation controls to be administered by an energy agency, ultimately the Department of Energy (DOE).

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* "When the Exception Becomes the Rule: Regulatory Equity, the Exceptions Process and the Formulation of Energy Policy" by Peter H. Schuck (1983). While not endorsing every statement and conclusion expressed in the report, the Conference commends the report for its value in examining a significant exceptions program during periods of difficulty.

** The Conference expresses its views here in a "statement" rather than the more forceful "recommendation" format because the program that was studied in detail is currently winding down, and because the data compiled on the exceptions processes of other agencies is not sufficient to support a recommendation of universal applicability.

Under this program, the energy agency issued rules prescribing distributional patterns and prices for petroleum products among producers, refiners, distributors, and end users. To deal with inequities created by the regulatory program, a "safety valve" process was established to grant exceptions in cases where individual firms suffered disproportionately. The exceptions office, ultimately called the Office of Hearings and Appeals (OHA), quickly became an important locus of power within DOE. OHA was kept separate and autonomous from the Economic Regulatory Administration (ERA), the rulemaking and enforcement arm of the Department.

The Office of Hearings and Appeals had the authority to issue exceptions to regulations, special redress orders, modification and recision orders, and stays of pending orders. OHA could order any firm to sell or to buy crude oil or refined products from any other firm in the industry under terms prescribed by OHA. These powers were exercised subject to the approval of a Departmental administrative review committee, and, if consensus was not reached, to the possibility of Secretarial review. The process was heavily influenced by OHA's leverage and expertise.

Achievements and Problems

Four detailed case studies were made of the operation of OHA: the subsidization of small refiners during 1974-1981, the handling of disparities caused by the Iranian oil embargo in 1979, the pricing of Alaska crude oil, and the motor gasoline crisis of 1979. Each of these cases has its own peculiar context and history; as a whole they defy easy summarization. It seems undeniable, however, that as energy regulation became increasingly controversial in the 1970's, DOE policymakers—on matters of considerable importance—often deferred to the judgment and actions of OHA.

That office gradually was transformed from a mere safety valve dispensing equitable exceptions to individual firms caught up in over-broad rules into an important policymaking body within DOE, designing many of the substantive specifications for the very regulatory system whose pressures OHA was supposed to relieve.

OHA's achievements during the period of controls were impressive. OHA was able to process a large caseload and to decide important cases quickly. OHA decisions were generally regarded as being of high professional and intellectual quality. OHA was able to provide immediate relief when it appeared that delay would be tantamount to denial.

Nevertheless, problems began to crop up, especially as procedures designed for emergency relief became instruments for broad gauged policymaking.

Indeterminate equitable standards. Energy legislation has always prescribed three standards: relief must be necessary to prevent "special hardship," "inequity," or "unfair distribution of burdens." OHA elaborated these extremely ambiguous standards on a case-by-case basis; OHA's published guidelines sometimes provided little assistance as to the meanings of the standards.

Informal procedures. Neither the DOE Act nor the Administrative Procedure Act prescribes OHA's procedures in exceptions cases. The procedures devised by OHA were highly informal, combining elements of notice-and-comment rulemaking with an opportunity for a relatively summary adjudicative hearing. The courts were highly deferential to OHA's choice of procedures, citing the "emergency" nature of the program, even during periods when no actual emergency existed. The flexibility and informality that permitted expedition also occasioned criticism from regulatory participants who complained about lack of sufficient notice, and about inadequate procedures for discovery, hearings, and review and also made claims of unfair ex parte communications and combination of functions.

The "safety valve" mentality. By all accounts, DOE's rulemaking arm, the ERA, on many occasions deferred to OHA on fundamental policy problems that ought to have been confronted and resolved through a legislative-type process. Despite OHA's efforts to open its significant proceedings to public comment and to broaden the policy focus of the proceedings, the case-by-case exceptions procedure was not well-suited to development of sound policy and generally applicable rules. By its nature an exceptions process tends to examine anomalies and emergencies rather than typical situations. OHA's analytical focus was on hardships of individual firms rather than upon the effects that particular decisions could have on the industry as a whole or on consumers generally.

Interim relief. OHA often found it necessary to provide expedited relief to applicants after only a summary hearing and before issuing a proposed final decision for public comment. Relief was undoubtedly sometimes necessary to prevent irreparable harm due to delay, but reliance on interim decisions by those in the market led to adjustments and created new equities that made retractions difficult and possibly unjust.

Lessons

It is difficult fully and fairly to evaluate OHA's performance and the role of the exceptions process without taking into consideration two crucial factors: the comparative weakness of the DOE rulemaking process and the enormous problems associated with any program designed to regulate the entire petroleum industry. Nor are the insights gleaned in this study necessarily transferable to other programs in other agencies. Because many of the issues raised by DOE's exception process are endemic to broad regulatory programs, however, the Conference offers, to the extent they may be helpful, the following suggestions as an aid to congressional oversight and agency self-evaluation.

1. **Excessive use of exceptions.** Agencies should guard against the temptation to avoid necessary rulemaking, including the reconsideration of existing rules, through excessive reliance upon an exceptions process.

2. **Emergency programs.** Where an exceptions process begins as part of an emergency program, consideration should periodically be given to whether the emergency is continuing. Abbreviated agency procedures and extraordinarily deferential judicial review--which may be appropriate for an emergency--should be replaced by conventional agency and judicial standards of conduct when the emergency is over.

3. **Equitable criteria.** In some circumstances, explicit congressional prescription of the equitable or other criteria that shall govern an exceptions process would be helpful. Agencies should consider the issuance of regulations further defining those criteria and prescribing the procedures to be used in exceptions proceedings.

4. **Procedures tailored to equities.** Procedures governing exceptions cases should reflect the need for particularized regulatory equity in the applicable program. The procedures provided for relatively routine "hardship" applications and for those cases of broader policy significance should differ to take account of the differing demands for information, fairness, and legitimacy. To the extent feasible in light of the need for speedy action, adequate notice of an application for exceptions relief should be given to all interested members of the public, and relief should be granted or denied only after an opportunity for full development of the relevant factual and policy issues.

5. **Emergency relief.** Where an exceptions program allows for emergency, interim relief, an agency should consider the inclusion of suitable mechanisms—such as an escrow fund, interest obligation, or expiration date for interim orders—to restore the

status quo ante insofar as possible in the event that such relief is subsequently determined to be inappropriate.

6. Exceptions tribunal. The form and independence of the tribunal that is to decide exceptions cases should depend chiefly upon the policy significance of the exceptions decision and the value of exceptions relief to applicants. The greater the precedential and policy significance of an exceptions decision, the more closely the tribunal should be integrated into the policy-sensitive and politically-accountable decision processes of the agency. The more the exceptions decision is routine, without precedential significance, and purely equitable or "hardship" in nature, the more readily it may be delegated to decision processes that are more autonomous and adjudicatory in character.

7. Significant cases. If an exceptions tribunal decides a case with broad policy significance, the proceeding should be conducted much as a rulemaking with broadened participation in the exceptions adjudication and with an opportunity for public comments on all significant policy, factual, and remedial issues in the case.

BACKGROUND REPORTS
FOR
1983 STATEMENTS OF THE
ADMINISTRATIVE CONFERENCE
OF THE
UNITED STATES

BACKGROUND REPORT FOR STATEMENT 9

AGENCY ARTICULATION OF POLICY

Report to the Administrative Conference
of the United States

by

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C 1983 Colin S. Diver

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I. INTRODUCTION

Scholars and judges have spilled vast quantities of ink lamenting the imprecision of legislative delegations to administrative agencies.(1) More recently, despairing of greater legislative precision, critics have increasingly turned their fire on the agencies themselves. As the anointed repositories of sovereign power, administrators have a high duty, we are told, to articulate the conditions under which they will exercise that power.(2)

The Administrative Conference of the United States (ACUS) has been a particularly staunch advocate for administrative articulation of standards. Its most comprehensive--and hortatory--statement of this position can be found in its Recommendation Number 71-3:

> Agency policies which affect the public should be articulated and made known to the public to the greatest extent feasible.(3)

Several more narrowly focused ACUS Recommendations echo these sentiments. For example, Recommendation 70-2 declared that the Securities and Exchange Commission should:

> to the maximum feasible extent state in the form of rules the legal interpretations, the policies, and the standards guiding discretion which it and the Division staff apply in determining registration obligations in the no-action process.(4)

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1. See, e.g., J. Ely, Democracy and Distrust 131-34 (1980); T. Lowi, The End of Liberalism 92-126 (2d ed. 1979); Wright, Beyond Discretionary Justice, 81 Yale L.J. 575 (1972).

2. E.g., H. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards (1962); Davis, A New Approach to Delegation, 36 U. Chi. L. Rev. 713 (1969).

3. 1 C.F.R. § 305.71-3 (1981).

4. Recommendation 70-2(1). For a description of the basis for this Recommendation, see Case Study IV(E) infra.

In Recommendation 71-5, ACUS called upon the Immigration and Naturalization Service to promulgate "regulations which establish the rules and standards for decisions in change-of-status cases."(5) Later Recommendations exhorted the United States Parole Board to "formulate general standards to govern the grant, deferral or denial of parole,"(6) the Labor Department to "develop standards" for making alien labor certification decisions,(7) federal grant-making agencies to "state their objectives, criteria and requirements with as much specificity as practicable,"(8) and federal banking agencies "to provide a full statement of their objectives" in making chartering or branching decisions, preferably by "policy statements and rules of general applicability, which should be as specific as possible."(9)

The Conference's frequent calls for fuller articulation of administrative policy reflect a variety of concerns. One can discern at least seven distinct objectives at work:

1. To provide greater guidance to members of the public in planning their conduct;

2. To facilitate judicial review of agency action for consistency with statutory objectives;

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5. Recommendation 71-5(A). *See* case study IV(C) *infra*.

6. Recommendation No. 72-3(A). *See* case study IV(F) *infra*.

7. Recommendation No. 73-2(B), 38 Fed. Reg. 16839, 16840 (1973). *See* case study IV(D) *infra*.

8. Recommendation No. 74-2(B)(4), 39 Fed. Reg. 23041, 23042 (1974).

9. Recommendation No. 75-1(1), 40 Fed. Reg. 27925 (1975). *See* case study IV(H), *infra*. For further examples, see ACUS Recommendations 71-4(2), 1 C.F.R. § 305.71-4 (1981) (criteria for "selection of grantees" under discretionary grant programs); 78-1(A), 43 Fed. Reg. 27507 (1978)("generic issues" in ratemaking); 78-2(C)(2), 43 Fed. Reg. 27508 (1978) ("regulatory codification of settled or established policies" in Social Security Disability Insurance Claims Administration); 79-3(A), 44 Fed. Reg. 38824 (1979) ("standards for determining appropriate penalty amounts for individual cases" involving administrative assessment of a civil money penalty).

3. To facilitate political review of agency policy for its soundness or acceptability;

4. To enable agency superiors to exercise greater control over the actions of their subordinates;

5. To encourage greater voluntary public compliance with regulatory programs by enhancing their credibility;

6. To reduce the cost of adjudications by focusing participants' energies on decisionally relevant issues; and

7. To provide individuals threatened with adverse outcomes a more meaningful opportunity to participate in the decisionmaking process.

Articulation of policy, in short has been justified as a means to enhance the effectiveness, efficiency, consistency, and acceptability of administrative action.

Why, then, despite these manifold blessings, does one hear such frequent criticism of administrative inarticulateness? One possible explanation is administrative ignorance or neglect--agency heads simply fail to appreciate the benefits of fuller policy elaboration. This hypothesis receives some support from the readiness with which some agencies have responded to criticism of this sort.(10) But the resistance of many other agencies to such advice (11) suggests that the explanation must go far deeper. The precision with which an agency head articulates agency policy must reflect conscious choice far more often than mere inertia or neglect. Agency heads face far too many demands for articulation of policy--from subordinates seeking direction, from the regulated public seeking guidance, from Congress or the White House seeking explanation, from courts seeking justification, and from various self-appointed watchdogs seeking anything from cheap publicity to the Holy Grail--to consign that dimension of their task solely to accident or fate.

One need not search far to imagine at least some of the reasons for administrative resistance to recommendations of the

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10. See, e.g., case studies IV(E) (Parole Guidelines) and IV(D) (Labor Certification), infra.

11. See, e.g., Case Studies IV(C) (INS Change-of-Status) and IV(I) (Comparative Broadcast Renewal), infra.

sort described above.(12) Fuller articulation of policy comes at a cost, often a high cost. More specific rules often unavoidably sweep within their coverage forms of conduct that we would not wish to be regulated, or fail to reach conduct that we do wish to regulate. Increased precision often implies an increase in complexity that drives up the cost of applying and interpreting a rule. Writing an appropriately detailed rule can also require a large initial investment in factfinding and evaluation so as to anticipate correctly its consequences in a wide range of applications.

Once one acknowledges--as every serious commentator has--that the drive for increased regulatory specificity is subject to some limit, the problem becomes vastly more complex. How does one tell, when looking at a particular policy, whether it is excessively vague or precise? What advice can one give an agency, embarked upon a course of increasing its rule precision, on where to stop? The ACUS Recommendations cited earlier bear solemn witness to the difficulty of this task. Those who confidently attack agencies for their inarticulateness often lapse into extreme vagueness themselves when pressed to convert condemnation into operational advice.(13) Agencies should "articulate" their "policies" to the "greatest extent feasible."(14) They are admonished to "state their criteria with as much specificity as practicable."(15) What is "feasible"? "Practicable"? "Specificity"? Are these concepts amenable to objective measurement, or are they, like beauty, solely in the eye of the beholder?

The purpose of this report is to tackle these questions. By giving content to the elusive concept of regulatory precision, it seeks to generate a firmer basis for making evaluative judgments about administrative lawmaking and converting these judgments into concrete advice. It begins by examining the various possible meanings of regulatory "precision" and developing, from those options, a workable definition. The report then shifts to methodological questions. After discussing alternative methods of studying rule precision, it develops a simple cost-benefit framework. The next section applies that framework to account for

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12. See, e.g., K. Davis, Discretionary Justice: A Preliminary Inquiry 28-42 (1969).

13. See Reiss, Research on Administrative Discretion and Justice, 23 J. Legal Educ. 69, 72 (1970) (criticizing Davis, supra note 12).

14. Recommendation 71-3.

15. Recommendation 74-2.

and evaluate the precision of nine specific administrative policies. The final section draws conclusions and makes recommendations for administrative practices from the findings of these nine case studies.

II. THE CONCEPT OF RULE PRECISION

When we criticize a legal standard (or "rule," loosely defined) as insufficiently "specific" or "precise," what do we mean? A rule is a means of communication -- a prescription or proscription addressed by one party (the "rulemaker") to another party or parties (the object of the rule, who may be a person charged with its implementation, a person whom it is intended to benefit, or a person whose primary behavior it seeks to constrain). "Precision," then, must be a property of the verbal formulation used to embody a rule that relates to the efficacy with which it communicates its intended message.

Legal standards have several properties that bear on the effectiveness with which they perform their intended function. One is "clarity" or "transparency."(16) Transparency is the degree to which a rule evokes a uniform or consistent interpretation in many minds. A transparent rule, like a clear pane of glass, allows each observer to see the same image--to reach the same conclusion about legal consequences when confronted with the same evidence. Transparency obviously enhances the functional utility of a rule by increasing the likelihood that the rulemaker's intention will be communicated without distortion to the rule's audience.

A second property of rules is their simplicity or complexity. A legal standard increases in complexity as the decision rule it specifies grows in sophistication or elaboration. Other things being equal, one rule is more complex than another, the larger the quantity of input (evidence) or the less accessible the inputs demanded by its decision rule; the larger the number of steps required by its decision rule; or the more technical and specialized the process of manipulating the inputs to arrive at a result.(17) Complexity impacts upon a rule's functional utility

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16. The term "transparency" was used by Jerry Mashaw to describe the same concept. J. Mashaw, Bureaucratic Justice (1983). It is similar to Duncan Kennedy's "formal realizability." Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1687 (1976).

17. See Brodley, In Defense of Presumptive Rules: An Approach to Legal Rulemaking for Conglomerate Mergers, in The Conglomerate Corporation: An Antitrust Law and Economics Symposium 249, 255-60 (R. Blair & R. Lanzillotti, eds. 1981).

by driving up the cost of its application.

A third property of a legal rule is its fitness, or "congruence," with the underlying policy objective.(18) A congruent rule is one that identifies as proscribed (or mandatory or permitted) only that behavior that "ought"--under the rulemaker's governing normative system--to be proscribed (or mandated or permitted). A prohibitory rule's congruence declines, for example as it sweeps within its coverage more and more actions whose prevention would defeat the rulemaker's goal, or as it fails to reach more and more actions whose occurrence would defeat the rulemaker's goal. Congruence, in this sense, is an essential determinant of the efficacy of a rule's verbal formulation in achieving its intended outcome.

A call for better "articulation" of policy or increased "specificity" might implicate any one or all of these three properties. The critic might be lamenting the opacity, complexity, or incongruity of an existing verbal formulation. One can see evidence of all three themes in the critical literature, including the various ACUS Recommendations and their supporting studies. But the dominant theme is the opacity--the lack of transparency-- of the standards applied by the agencies studied. These criticisms evoke a longstanding concern in administrative law about the breadth of legislative "delegations" and dministrative "discretion."(19) There is no shortage of critics to bemoan the substantive perversity or Byzantine intricacy of administrative policies. But the school of criticism symbolized by the ACUS reports has zeroed in on a different perceived ailment--the propensity of too many administrators, for lack of wit, wisdom, or will, to consign the policies they enforce to a permanent state of obscurity.

For this reason, I have adopted the concept of rule "transparency" as my dependent variable. That is not to say that rule complexity and congruence do not feature prominently in the study. They do, but as explanatory or independent variables, rather than as the object of study. As we shall see, attempts to increase a rule's transparency typically affect--usually in an adverse fashion--its complexity or congruence. Consequently, a careful examination of the one necessarily implicates the other two, and any effort to construct a theory to explain or evaluate

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18. Paul Brest uses the term "congruence" to refer to the "fit" of a legislative classification to the legislature's underlying goal in the context of constitutional "rational basis" review. P. Brest, Processes of Constitutional Decisionmaking: Cases and Materials 478, 480 (1975).

19. See notes 1 & 2 supra.

the degree of transparency will implicate, as explanatory or justificatory variables, congruity and complexity.

III. METHODOLOGY OF THE STUDY

Like the criticisms that inspired this study, this report is essentially normative in nature. That is, it attempts to provide a basis for reaching an evaluative judgment about a particular aspect of administrative behavior. Is this particular administrative standard articulated with the proper degree of clarity? Should its transparency be increased? Should the agency have adopted a particular clarifying amendment proposed or considered?

Degree of rule precision occupies an important place in virtually any coherent school of legal philosophy.(20) Clarity in rules can promote such fundamental normative goals as providing fair notice and assuring evenhanded treatment.(21) Yet invocation of such a priori moral values does not furnish a very promising means of assessing particular verbal formulations. For excessive precision of legal rules can offend equally compelling values of participation and individualized treatment.(22) Except perhaps at the extremes of complete obscurity or mechanistic formula, evaluating the work-product of particular rulemakers threatens to degenerate into an irreconcilable clash of warring principles.

Rather than try to settle such disputes by invoking moral absolutes, I have adopted a method that attempts, however crudely, to measure and compare the competing interests at work in an effort to locate the appropriate balance. Adopting this approach converts the argument from the elevated rhetoric of moral

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20. See, e.g., R. Dworkin, Taking Rights Seriously 14-80 (1977); H.L.A. Hart, The Concept of Law 120-50 (1961); Christie, The Model of Principles, 1968 Duke L.J. 649; Raz, Legal Principles and The Limits of Law, 81 Yale L.J. 823 (1972).

21. For a particularly emphatic statement of the moral force behind demands for legal clarity, see L. Fuller, The Morality of Law (rev. ed. 1969).

22. See, e.g., J. Shklar, Legalism (1964); Tribe, Structural Due Process, 10 Harv. C.R.-C.L.L. Rev. 269 (1975).

principle to the crasser language of costs and benefits.(23) But it provides a more hopeful basis for making the unavoidable trade-offs entailed in decisions about rule precision.

The first task in applying this method is to catalog the possible consequences, favorable and unfavorable, of varying the degree of a rule's transparency. To illustrate, imagine a choice between two simple versions of a retirement rule for commericial airline pilots:(24)

Model I:	"No person may serve as a pilot on a commercial airplane if that person has reached his sixtieth birthday."
Model II:	"No person may serve as a pilot on a commercial airplane if that person's physical and mental condition create an unreasonable risk of accident."

Several considerations argue in favor of Model I. Model I may produce a higher level of compliance than Model II. It is easier (cheaper) for pilots to apply to their own situations than II. Pilots will be able more accurately to predict how the rule will be applied by those charged with its enforcement (and therefore what consequences will flow from various events or states of the world). They might also find a clear rule more morally acceptable and hence worthy of voluntary obedience. Put another way, pilots are less likely to make costly (and frequenty effective) efforts to evade or sabotage the rule.

Model I also seems easier (cheaper) to enforce. If it increases compliance, there will be fewer violations to process. If it increases accuracy of prediction, there will be fewer requests for interpretation to process. And since it is highly objective, the disputes that do arise can be resolved quickly and accurately. Model II, by contrast, will generate numerous and expensive conflicts. In the absence of clear standards,

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23. The framework has been most fully developed by Ehrlich & Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Studies 257 (1974). *See also* G. Tulloch, Trials on Trial: The Pure Theory of Legal Procedure 184 (1980).

24. *See* case study IV(A) (FAA age-60 rule), *infra*.

factfinding and offers of proof will range far and wide. Great effort will be expended on interpreting the meaning of the standard and, in effect, making successive elaborations of its meaning in individual cases.

Not so fast, say Model II's champions. Increased compliance is counterproductive if the rule induces the wrong behavior. Rule I will burden society by depriving it of the services of safe, experienced sexagenarians. Even the claim of Model I's lower transaction costs must be tempered with some healthy skepticism. Arbitrary rules inevitably invite demands for modification. The proponent of Model I will spend his days defending his rule against attacks and probably will end up making some sort of provision for granting exceptions in deserving cases. Processing petitions for waiver will consume many of the same social resources required for the administration of Model II.

Varying the degree of precision with which a rule is expressed, then, can have an impact on both the primary behavior of the rule's addressee and upon the transaction costs associated with administering the rule. Refining these concepts further, one can identify four principal subcategories of potential costs and benefits:

1. Rate of Compliance

Increased rule precision may increase the rate of compliance with a rule (and decrease evasion or concealment costs) by reducing the cost, to the rule's addressee, of determining how the rule will apply to his intended conduct, and by raising the addressee's estimated probability that undesirable conduct will be punished or desired conduct will be rewarded. If increasing a rule's transparency causes it to become more complex or less congruent, however, at some point further clarification may reduce the rate of compliance by driving up the cost of locating the applicable provision or by reducing the rule's moral acceptability.

2. Congruence

Increasing the precision of a rule increases the risk of unintended over- or under-inclusiveness. This may result from the rulemaker's inability to predict all of the consequences of applying the rule or all of the circumstances to which it may apply. While presumably the rulemaker can later change the rule upon learning of the misfit, social losses will be incurred in the interim. The cost of subsequently amending the rule is also an ingredient of the cost of over- or under-inclusiveness.

On the other hand, a relatively opaque rule, though facially congruent, may be over- or under-inclusive _in application_, because vagueness invites misinterpretation. Increasing a rule's transparency may, therefore, substitute "errors of misspecification" for "errors of misapplication." The relative magnitudes of the social losses occasioned by each type of error will determine the net congruence gain or loss.(25)

3. Rulemaking Costs

Writing a transparent rule may require a larger initial investment of resources in obtaining and evaluating information. This cost is at least a partial substitute for the costs of over- or underinclusiveness. More careful initial analysis reduces the scope of misspecification and its attendant costs. Rulemaking also typically requires the accommodation of conflicting views. This is especially true of collegial bodies, but is in fact true of most hierarchial agencies as well. The more precise a rule, the larger the range of agreement necessary and consequently the higher the costs of reaching agreement.(26) A related cost, from the rulemaker's perspective, is the risk that enhanced visibility of policy may increase political criticism (and thereby increase agency costs of blunting the criticism).

On the other hand, greater initial precision can reduce the need for future rulemaking activity by leaving fewer policy questions open for later resolution. An investment in more precise draftsmanship can thus reduce the volume of resources that must be devoted either to subsequent "common-law" rulemaking (elaboration of reasoned justifications in individual cases having precedential value) or to subsequent generic "legislative" rulemaking. Enhanced initial rule transparency can also reduce the agency's subsequent investment in internal quality-control mechanisms, such as employee training or auditing to assure consistency and correctness of decisions made by individual enforcement personnel.

4. Dispute Resolution Costs

Greater rule precision can reduce the number of disputes to be decided (by increasing the rate of compliance) and reduce the cost of resolving those disputes that do arise (by focusing disputants' energies more exclusively on relevant matters and by causing their predictions of the outcome to converge). On the other hand, the increased complexity or reduced congruence that frequently accompany clarification may well drive litigation costs up.

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25. See Mashaw, Administratave Due Process as Social-Cost Accounting, 9 Hofstra L. Rev. 1423, 1430-36 (1981).

26. See Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263, 289 (1982).

Having classified the various consequences flowing from a change in rule precision into these four categories, one must specify a decision rule for drawing an ultimate normative judgment about any particular rule formulation. The procedure implicit in the approach sketched above, of course, is to aggregate the impacts under the four categories into one overall "score." Theoretically, one can evaluate any particular verbal formulation, taken in isolation, merely by looking at the sign of its score (positive=acceptable; negative=unacceptable). In practice, however, normative judgments about rule precision tend to be useful only on a comparative basis. One verbal formulation is either more or less desirable than another. Consequently, the case studies that follow will typically involve comparisons between two or more alternative versions of a rule (proposed or adopted) rather than absolute judgments about existing versions.

Applying this decision rule to actual cases requires an ability to do two things: 1) to rank (at least ordinally) two or more alternative rule formulations in terms of their degree of precision; and 2) to compute and aggregate the various costs and benefits associated with each (or of shifting from one to another). My earlier definition of "transparency" suggests a way to "measure" degree of rule precision. Present a random sample of a rule's intended audience with a series of hypothetical questions requiring its application to concrete situations. The ratio of agreement among the respondents would then be a suitable measure of its "transparency." Similarly, one can in principal compute the costs and benefits flowing from a change in rule precision, either by carefully collecting and statistically analyzing data on the consequences of an actual amendment, or by conducting a carefully controlled experiment.

Formidable obstacles stand in the path of such an endeavor. Aside from its obvious cost, empirical measurement of precision and its consequences confronts rather ticklish conceptual problems, as well. For example, combining the several elements of a complex rule into one overall "precision rating" is unavoidably judgmental. Superficially, a rule with a larger proportion of transparent words or phrases may seem more "precise." But one really needs to know the relative number and social importance of the controversies foreclosed (by the transparent elements) or left open (by the opaque elements). An extraordinarily transparent rule with an open-ended exemption clause, for example, may, by channeling all of the controversy into demands for exemptions, be little better than no rule at all. A survey administered to a sample of a rule's audience must therefore be carefully structured to reflect the distribution of conditions or behaviors that the rule will actually confront.

Another methodological difficulty is isolating the effects of changes in rule precision from the other changes constantly occurring in any regulatory program. Any change in the precision of a rule necessarily involves a simultaneous change in its substantive content. Changing words changes meanings. Sometimes, the nature of the substantive shift is clear enough, but isolating its impact on, say, compliance rates or transaction costs, from the impact of a shift in the degree of precision is nonetheless difficult. Other times, the nature and magnitude of the substantive policy shift itself is obscured by the very opacity of the original standard. Changes in a rule's content may also be accompanied by changes in the procedure for its enforcement whose implications cannot easily be disentangled from consequences of the formal amendment.

What emerges as the most important variable in many cases--incongruity effects--presents an additional conceptual problem. How can one determine the true "goal" of the program in question (with enough specificity to "measure" congruence losses resulting from over- or under-inclusive language) without relying on the very verbal formulation selected by the agency in which to embody its policy? This conceptual dilemma has long bedeviled "rational basis" review of statutes.(27) It is somewhat more tractable in the present context than in that context, since one can draw some guidance, in the search for a rule's the background statute. But, the organic act is often itself too vague to provide much operative guidance. Ironically, the legislative delegations that cry out most plaintively for administrative clarification can, by their very obscurity, defeat the mode of analysis advanced here.

My principal response to these objections is to plow ahead in spite of them. Limitations on the scope of this project preclude the extensive original data gathering and analysis that would be required to quantify degrees of rule precision or their attendant consequences. But an intuitive reading of regulatory language will usually support a defensible ordinal ranking of rule formulations. Reported data, secondary commentary, and participants' observations can, moreover, support at least a qualitative assessment of costs and benefits. And the

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27. See, e.g., P. Brest, supra note 18, at 565-66; Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970); Gunther, The Supreme Court, 1971 Term -- Foreword: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

difficulties of causation and goal-definition adverted to above can be held to manageable dimensions by making a few plausible intuitive assumptions.

Rather than relying on the more prevalent approach of intensively studying a single agency or program, I have utilized the more extensive methodology of multiple case studies. This approach permits comparative analysis across a wide range of contextual dimensions, such as the size and composition of the rulemaking body, the kinds of primary outcomes desired by the rule's authors, the type of administrative function involved, the size and interests of the rule's audience, and the organization and complexity of the mechanism used to enforce the rule. A comparative study helps to highlight the significance of these and other variables for judgments about rule precision.

The following nine case studies have been selected

1. The Federal Aviation Administration's "age 60 rule" for pilot retirement;
2. The Social Security Administration's definition of "disabled" under the Disability Insurance Program;
3. The Immigration and Naturalization Service's criteria for adjusting the status of nonimmigrant aliens to permanent residence;
4. The Labor Department's rules for certifying aliens for domestic employment;
5. The Security and Exchange Commission's definition of "underwriter" for purposes of exempting resale of restricted securities from the registration requirement;
6. The United States Parole Commission's guidelines for parole release;
7. The Transportation Department's criteria for assessing money penalties for Hazardous Materials Transportation Act violations;
8. The Comptroller of the Currency's policy governing chartering of national banks; and
9. The Federal Communications Commission's comparative broadcast license renewal standards.

Two selection principles were used. The first was the ready availability of information or commentary relating to the precision of the policy in question. Seven of the case studies (all but numbers 1 and 7) are based on studies previously sponsored by ACUS, five of which (numbers 3, 4, 5, 6, and 8) generated explicit recommendations for further articulation of the policy in question. In addition, case study number 7 builds on previous work done by the present author that grew out of an ACUS study. Case study 1, finally, focuses on a celebrated and well-documented illustration of extreme verbal transparency and simplicity.

The second selection criterion was balance. While no systematically random process was used, I did seek to produce a portfolio of case studies that was balanced in terms of the contextual elements discussed above. For example, three case studies (5, 6, 9) involve collegial rulemakers ("independent" agencies), and six, hierarchical rulemaking agencies. Types of administrative function involved include occupational or business licensing (1, 8, 9); dispensation of benefits or privileges to individuals (2, 3); regulation of primary conduct (4, 5); and imposition or determination of sanctions (6, 7). Individuals comprise the principal audience of four rules (1, 2, 3, 6) and businesses the other five. The enforcement mechanism ranges from highly decentralized (2, 3, 4) to highly concentrated (5, 8, 9). Annual caseload volumes range from under a hundred (9) to over a million (2). The procedures available for persons contesting the application of the rule run the gamut from extreme informality (5, 6, 8) to extreme formality (2, 3, 9).

The next section of this report contains separate descriptions of each case study, while the following section summarizes the general findings and recommendations that can be gleaned from them as a group. Each study begins with a description of the policy context and chronicles significant adopted or proposed changes in the verbal formulations used by the administering agency to implement the policy. The second half of each study analyzes and evaluates these changes in terms of the independent variables discussed above.

IV. CASE STUDIES

A. The FAA's Age 60 Rule for Pilot Requirement

The Federal Aviation Act of 1958 authorized the Federal Aviation Administration (FAA) "to promote safety of flight of civil aircraft," giving "full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest."(28) Among the

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28. 49 U.S.C. § 1421 (1980).

more specific charges, the law instructed the FAA to "develop reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen . . . .(29) The Act evinced an almost monolithic concern for maximizing safety of air transportation.

As part of its program to implement the Act, the FAA promulgated the so-called Age 60 Rule in 1959, to be effective on March 15, 1960:

> No individual who has reached his 60th birthday shall be utilized or serve as a pilot on any aircraft while engaged in air carrier operations.(30)

In explaining the basis for the rule, the FAA Administrator expressed concern about "the progressive deterioration of certain important physiological and psychological functions" thought to be associated with age.(31) The decision that age was a legitimate consideration was reinforced by the perceived inability to develop an alternative means to identify unsafe pilots on an individual basis:

> Any attempt to be selective in predicting which individuals are likely to suffer an incapacitating attack would be futile under the circumstances and would not be medically sound.(32)

Although the agency conceded that "available data does not permit any precise determination of the age at which continued activity as a pilot can be said conclusively to constitute a hazard to safety under normal or emergency conditions of flight,"(33) the age-60 cut-off was selected

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29. 49 U.S.C. § 1421(a)(5) (1980).

30. 24 Fed. Reg. 9773 (1959).

31. 24 Fed. Reg. 5248 (1959) (notice of proposed rulemaking.

32. 24 Fed. Reg. 9772 (1959).

33. 24 Fed. Reg. 5249 (1959).

for lack of any more defensible alternative. The FAA did, however, suggest a willingness to consider modifying the rule as new evidence became available:

> While Medical science may at some future time develop accurate, validly selective tests which would safely allow selected pilots to fly in air carrier operations after age 60, safety cannot be compromised in the meantime for lack of such tests.(34)

Nonetheless, the rule as it stands today is almost identical to the original:

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.(35)

During the rule's 22 year life the FAA has steadfastly resisted pressures to amend it. As recently as 1979, an FAA deputy administrator summarized its position for Congress:

> Intervening years have not eliminated the basis that led to the administrator's decision in 1959 . . . . We are still unable to adequately and timely identify those older individuals who would represent a hazard to safety.(36)

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34. 24 Fed. Reg. 9772 (1959).

35. 14 C.F.R. § 121.383(c) (1981).

36. Age Discrimination Against Airline Pilots: Hearings Before the Select House Comm. on Aging, 96th Cong., 1st Sess. 44, 46 (1979) [hereinafter cited as Select Comm. Hearings] (statement of Quentin S. Taylor, Deputy FAA Administrator).

Administrator Langhorne Bond confirmed later in the year that FAA had "reached the conclusion that the rule is currently valid," while acknowledging that "the present system is 'arbitrary' to a large degree."(37)

The FAA has sponsored several efforts to develop a more individualized test for pilot decertification. Shortly after promulgating the Age 60 Rule, the FAA launched a study "to tailor a retirement standard for each pilot instead of requiring all to retire at the age of 60."(38) The predicted amendment never ripened into reality, however. The study was abandoned some 5 years and $2.5 million later amid "serious questions."(39) The FAA later contributed funds to a study conducted by the Lovelace Foundation. While this 11 year study produced some encouraging findings, its results were never translated into action by the FAA.(40) The FAA also contributed an annual $75,000 to an ongoing Navy study of 1000 aviators, but, again, found its results (released in 1978) inconclusive.(41) Although the FAA has recently withdrawn from sponsoring research itself, it has established a small office to monitor outside research, and, in 1979, it contracted for a thorough review of the state of the art.(42)

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37. To Eliminate Age Limitations Presently Imposed on Certain Pilots of Aircraft: Hearings on H.R. 3948 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 96th Cong., 1st Sess. 12 (1979) [hereinafter cited as Aviation Subcomm. Hearings] (letter from Langhorne Bond to Congressman Jim Lloyd, June 27, 1979).

38. N.Y. Times, Mar. 11, 1962, at 88, col. 1 (statement of FAA Administrator Najeeb Halaby).

39. Aviation Subcomm. Hearings, supra note 37, at 44.

40. Id. at 88 (testimony of Dr. R. Bruce).

41. Id. See MacIntyre et al, Longevity in Military Pilots: 37 Year Fellowship of the Navy's "1000 Aviators," Aviation, Space & Env'l Medicine, Sept. 1978, at 1120.

42. See Pilots' Rights Ass'n, Inc. v. FAA, 86 F.R.D. 174, (1980).

Throughout its lifetime, the Age 60 Rule has drawn constant criticism for its overinclusiveness. The rule's earliest and, until recently, most persistent critic has been the Air Line Pilots Association (ALPA). After unsuccessfully opposing the rule's initial adoption,(43) ALPA turned to the courts. Its challenge to the rule's rationality in the case of ALPA v. Quesada failed, however, producing this characteristically deferential judicial response:

> It is not the business of the courts to substitute their judgment for the expert knowledge of those who are given authority to implement the general directives of Congress.(44)

Subsequent efforts to enlist judicial support in the attack on the rule have proved equally unavailing. Encouraged by a suggestive footnote in the Quesada case,(45) several pilots petitioned the FAA for exemption from the Age 60 Rule pursuant to a statutory provision that authorizes the Administrator to "grant exemptions . . . if he finds that such action would be in the public interest."(46) But the FAA promptly denied all petitions for exemption and was uniformly upheld on appeal.(47) Although the courts did not struggle very hard to give meaning to the exemptions provision, one of the courts did at least deliver a few words of warning to the FAA:

> At some point, the state of the medical art may become so compellingly supportive of a capacity to determine functional age equivalents in individual cases that it would be an abuse of discretion not to grant an exemption.(48)

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43. See Comment, Mandatory Retirement of Airline Pilots: An Analysis of the FAA's Age 60 Retirement Rule, 33 Hastings L.J. 241, 245-46 (1981).

44. Air Line Pilots Ass'n, Int'l. v. Quesada, 276 F.2d 892, 898 (2d Cir. 1960).

45. 276 F.2d at 898, n. 10.

46. 49 U.S.C. § 1421(c) (1981).

47. Keating v. FAA, 610 F.2d 611 (9th Cir. 1980); Rombaugh v. FAA, 594 F.2d 893 (2d Cir. 1979); Gray v. FAA, 594 F.2d 793 (10th Cir. 1979); Starr v. FAA, 589 F.2d 307 (7th Cir. 1978). See also O'Donnell v. Schaffer, 491 F.2d 59 (D.C. Cir. 1974).

48. Gray v. FAA, 594 F.2d 793, 795 (10th Cir. 1979).

Having failed to secure relief from the agency or the courts, ALPA shifted the battleground to Capitol Hill. After complaining to Congress in 1969 that the "FAA has rejected each and every request for a[n] exchange of news with ALPA concerning the age 60 regulation,"(49) ALPA did succeed in convincing the FAA to reopen the issue. But, after holding informal public hearings in October 1971, the FAA denied petitions to rescind the rule in March 1972.(50)

More recently, ALPA has helped to instigate a growing group of age-conscious Congressmen to hold hearings aimed at sensitizing the FAA. During his confirmation hearings in 1977, a senate committee elicited a promise from Langhorne Bond to look into the matter personally.(51) Later that year, he made this report on the results of his investigation:

> I would favor replacing the age 60 rule with a system based on a psycho-physiological age index if I could be satisfied that a proven scientific basis exists and a feasible mechanism could be devised which could replace this rule while providing an equivalent level of safety. From my review of this matter, I am convinced that this capability has not yet been reached.(52)

Dissatisfaction with the FAA response, fed by growing support for the ALPA claims in the medical and scientific community, prompted Congress to consider directly modifying the age 60 rule. Several bills to modify the rule were introduced in 1979, but all failed. Congress did, however, adopt legislation directing the National Institutes of Health to conduct a study to determine whether the rule was "medically warranted."(53) NIH designated the National Institute on Aging as the unit responsible to conduct the study.

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49. Select Comm. Hearings, supra note 36, at 1369 (ALPA statement).

50. Id. at 46-47 (testimony of Quentin Taylor, Deputy FAA Administrator).

51. Id. at 47.

52. Id.

53. Pub. L. 96-171, 93 Stat. 1285 (1979).

While the study was pending, the ALPA Board of Directors voted to abandon its longstanding opposition to the age 60 rule, citing its success at adjusting pilots' salaries and pensions to the age 60 retirement date.(54) In the meantime, however, a group of dissident pilots formed an organization called the Pilots' Rights Association to carry on the movement for reform.(55)

In August of 1981, the National Institute on Aging issued its report, urging the retention of the age 60 rule.(56) The report acknowledged that "there is no convincing medical evidence to support age 60, or any other *specific* age, for mandatory pilot retirement."(57) But it did conclude, from examining "available actuarial and epidemiological data," that the probability of "accidents attributed to acute or subtle incapacitation" of pilots would increase with an increase in pilot age.(58) After examining a wide array of medical and performance simulation tests, the NIA panel found none able reliably to predict loss of function with sufficient accuracy to replace the simple age criterion.(59)

The Age 60 Rule is pure Model I: almost perfectly transparent and elementally simple. The history of the rule suggests two obvious questions: What is it about this particular subject that has led the FAA to adopt this strategy, and why, having adopted it, has the FAA maintained it so stubbornly? Model I formulations are likely to seem especially attractive when enforcement is particularly difficult or costly. These considerations might plausibly have motivated the FAA in 1959, even though its official explanation for the rule makes scant mention of them.(60) Involuntary retirement can exact a heavy toll on the unwilling

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54. ALPA, Comments Concerning the Institute of Medicine Report, in Report of the National Institute on Aging Panel on the Experienced Pilots Study C-19, C-39 to -40 (August 1981) [hereinafter cited as NIA Report].

55. *See* Technical Comments of Pilots' Rights Ass'n, *id.* at C-165.

56. *Id.*

57. *Id.* at 2.

58. *Id.* at 4.

59. *See id.* at 4, 7.

60. *Id.* 24 Fed. Reg. 9772-73 (1959).

pilot, in foregone income(61) and loss of professional satisfaction or self-esteem. Many pilots would presumably be willing to go to considerable lengths to avoid those consequences, either by evading the requirement or by challenging its application to them. Combatting evasion or responding to challenges could consume substantial resources. A bright-line retirement standard presents an attractive solution to the problem of minimizing these costs.

On reflection, however, the attraction of this explanation diminishes. In the first place, neither evasion losses nor rule-enforcement transaction costs could have appeared especially momentous in 1959. The risk of evasion, in particular, was inconsequential. Only a handful of airline pilots were then approaching retirement age. Although the FAA correctly foretold a substantial increase in the pilot population, only 80 airline pilots would have passed age 60 by 1962.(62) Piloting commercial aircraft, moreover, is a very visible activity, and the FAA could count on the carriers to help it police any reasonable retirement policy.(63)

The transaction-cost savings are somewhat more impressive. Disqualification from piloting commercial aircraft is a sufficiently severe deprivation to warrant a trial-type hearing of contested issues. Enforcement of a discretionary retirement standard, consequently, could generate very expensive proceedings involving a high proportion of the pilots to whom it was applied. Nonetheless, one must discount this cost by the "hidden" transaction cost of maintaining an arbitrary rule. The same large personal stakes that spawn litigiousness will also generate attacks on the rule itself. The history of the Age 60 Rule is a case in point. Efforts to soften the rule's hard edges, by nullification, amendment, and waiver, have consumed a vast, if

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61. Today, pensions average about 50 percent of pre-retirement salaries. For captains employed by major airlines, the resulting loss of income ranges from $30,000 to $50,000. NIA Report, supra note 54, at C-73 to -74 (Statement by Air Transport Ass'n). The financial impact of retirement in 1959 was more severe, since pensions were less generous in relative terms.

62. See 24 Fed. Reg. 5248 (1959).

63. Not only are carriers concerned to maintain good relations with the FAA, but they have consistently supported mandatory retirement at age 60. See NIA Report, supra note 54, at C-51 (Statement of Air Transport Ass'n).

unmeasured, quantity of social resources. The FAA has itself expended over $3 million on defensive studies, a sum undoubtedly dwarfed by the resources expended by ALPA, Congress, the courts, NIA, and other participants in the continuing controversy. One wonders whether the costs of administering a more discretionary criterion would have exceeded these hidden transaction costs. In explaining the FAA's 1959 decision, however, it is perhaps not immaterial that most of these costs have been borne by others.

In addition to these consequential transactional costs, one must consider the incongruity losses occasioned by the use of so sharp a dividing line. Prematurely grounding healthy pilots can involve two complementary forms of social cost: 1) the cost of training adequate replacements, or 2) the differential accident losses caused by insufficiently trained replacements. Even an agency so monolithically concerned with maximizing airline safety(64) should be responsive to costs such as these. Yet the 1959 FAA quite evidently was *not* troubled by these possible incongruity losses. One reason for this lack of concern related to contemporaneous developments in aircraft technology. The airline industry was beginning to introduce turbojet aircraft into commercial aviation on a large scale in the late 1950s. Operation of the new aircraft, even by experienced pilots, required extensive training. In fact, far from being concerned for the cost of replacing experienced pilots, the FAA expressed doubt whether any amount of retraining could break senior pilots of old habits well enough to assure proper response in emergency situations.(65)

A second reason for the FAA's apparent disregard of incongruity costs was the asserted absence of any better discriminant than age.(66) Granted, the FAA seemed to be saying, age is only a crude proxy for the presence of incapacitating conditions. But it does no good to bemoan the crudeness of that proxy unless a better predictor can be found. A predictor that permits pilots to fly past age 60 will, indeed, reduce the number of false negatives (robust pilots grounded), but only at the cost of increasing the number of false positives (unsafe pilots continued in service). It is possible -- though hardly evident

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64. *See* 24 Fed. Reg. 9773 (1959).

65. *Id.* at 9772-73.

66. *Id.* at 9773.

from the FAA's terse explanation for its rule(67) -- that the agency systematically estimated error rates for a variety of plausible alternatives. But it seems more likely that, having discounted the social cost of false negatives to nearly zero, it simply presumed that any increase in false positives would be intolerable.

If the case for the rule's original adoption rests heavily on the introduction of turbojet aircraft and the infancy of medical science, on what does the rule's retention in 1982 rest? The calculus clearly has changed. Transaction costs provide a much weightier argument for a Model I rule now than in 1959. The success with which ALPA has adapted pilot compensation plans to the reality of age 60 retirement--as evidenced by its recent about-face(68)--foretells a sharp reduction in organized attacks on the rule. Yet, the personal stakes for each retiring pilot--$30,000 to $50,000 per year(69)--are still large enough to guarantee a high level of individual litigation. With roughly 700 airline pilots reaching age 60 each year,(70) the potential transaction costs of administering a discretionary scheme have multiplied.

Yet so have the incongruity losses entailed by a hard-and-fast rule. No dramatic revolution in aircraft technology threatens the present generation of senior pilots with obsolescence. Data on aviation safety suggests, moreover, that the incidence of accidents declines steadily with pilot age, at least up to age 55 or 60.(71) At an estimated cost to train a new pilot of $250,000,(72) the replacement tradeoff begins to look a good deal less favorable than it did in 1959.

Time has also eroded the "lack of alternatives" argument. Much progress has been made in developing reliable measures for

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67. Id.

68. See text at note 54 supra.

69. See note 61 supra.

70. In 1979 there were about 3500 pilots in the 55-59 age cohort. NIA Report, supra note 54, at F-32.

71. NIA Report, supra note 54 at F-50 (commercial aviation: incidence declines to age 55, rises slightly thereafter), F-51 (general aviation: decline to age 60).

72. Id. at C-37 (statement of ALPA).

many important physiological functions.(73) Yet, as testing techniques have become more sophisticated, so has our appreciation of the conditions for successful pilot performance. The NIA panel concluded that there remain many critical functions, especially intellectual and psychological, for which no better discriminant than age has been found.(74) Unfortunately, most accident-producing pilot errors are attributable to malfunction of these processes.(75) Recent progress in developing testing procedures, in short, cannot guarantee a substantial reduction in the volume of false positives that an individualized screening process would generate.

The ultimate balance is not easy to strike. One can say with assurance only that in the 23 years since 1959, the stakes have risen on both sides of the calculation. The waste of skilled pilot manpower languishing in premature retirement is unquestionably much greater today. But, then, so is the number of lives that a more individualized screen would unavoidably entrust to aging pilots with undetectable risks. In the weighing of such imponderables, even a modest gain in transaction costs may be justification enough.

B. The Definition of "Disability" In The Social Security Disability Insurance Program

The Social Security Disability Insurance (DI) Program was enacted in 1956 and began operation the following year. The DI program pays benefits to wage earners enrolled in the Social Security program who lose their jobs as the result of a "disability." Dependents of disabled workers also qualify for benefits. The amount of the monthly benefit is a function of the worker's predisability wage rate, age, and number of dependents, and is subject to a ceiling. In 1978, for example, the average monthly benefit for an individual disabled person was $328 (up from $118 in 1969) and for a family was $639.(76) DI benefits are paid during the period of disability until its termination, death, or age 65 (at which time the recipient shifts to the Old-Age and

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73. See id. at F-23 to -26.

74. Id. at F-20.

75. See Select Comm. Hearings, supra note 36, at 106 (statement of Dr. S. Mohler).

76. Senate Finance Comm., Rep. No. 96-408, to accompany H.R. 3236, Nov. 8, 1979, at 11.

Survivors Insurance program). A 1978 study estimated the average DI claim to be worth $25,000 (present value of future benefits) to the applicant.(77)

Both the size and rate of growth of program costs are staggering. Total benefit payments have grown from $457 million in 1959, to $2.5 billion in 1969, to $13.4 billion in 1979.(78) During that time administrative costs have increased from $34 million to $377 million.(79) The criteria used to determine eligibility have momentous fiscal and human implications. In 1980, for example, 1.2 million people applied for DI benefits.(80) At the estimated $25,000 average value per claim, some $30 billion of potential claims against the DI Trust Fund hinged on the application of those criteria. A determination of eligibility has additional fiscal implications, because many DI recipients also qualify for Medicare and Medicaid. In 1979, payments under these programs to DI recipients were estimated at $7.3 billion.(81) On any reasonable assumption about the condition of those applicants, moreover, the magnitude of human suffering represented by those seeking relief in any one year is staggering.

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77. J. Mashaw _et al._, Social Security Hearings and Appeals 15 (1978).

78. 1961 Social Security Bull., Ann. Statistical Supp. 11; 1969 _id._ at 46; 1979 SSA Ann. Rep.

79. Schohel, Administrative Expenses Under OASDHI, Social Security Bull., March 1981, at 22.

80. Status of the DI Program, Subcomm. on Social Security of the House Ways and Means Comm., March 16, 1981, at 23 (Comm. Print 97-3).

81. Senate Finance Comm., _supra_ note 76. The definition of "disability" has even further fiscal consequences, since the same eligibility standard is used to award benefits under the Supplemental Security Income program. In 1979, one million claims were filed under the SSA Blind/Disabled program and 4.2 million disabled persons were receiving $6.6 billion in SSI benefits. _Id._ at 4.5.

The disability determination process has several steps.(82) Initial determinations are made by state health or vocational rehabilitation agencies under contract with The Social Security Administration (SSA). Initial decisions are based on written evidence furnished by the claimant and reports of medical examination and consultation with a vocational counselor. A claimant may request reconsideration of an unfavorable decision based on the record or any further evidence he wishes to submit.

Denial on reconsideration entitles the applicant to request a hearing before an SSA administrative law judge. These hearings have a far more inquisitorial than adversarial character. Disappointed claimants have a right of further appeal to SSA's Appeals Council and to the federal courts.

Since 1954 the statutory and regulatory criteria for determining DI eligibility have undergone periodic change. The 1954 statute defined "disability" quite simply, as:

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration....(83)

The two concepts introduced by that provision -- "substantial gainful activity" (SGA) and "physical or mental impairment" (PMI) -- have remained central to the legal definition of disability ever since.

SSA issued its first interpretive rules in 1957.(84) The definition of disability, in retrospect, is remarkably brief and indefinite. Aside from enumerating factors to be considered (severity of impairment being "primary," others being education, training, and experience), the rules' most transparent gesture was a list of nine impairments "which would ordinarily be considered

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82. For a brief description, see Schwarz, Adjudication Process Under U.S. Social Security Disability Law: Observations and Recommendations, 32 Ad.L.Rev. 555 (1980).

83. Pub. L. 761, 68 Stat. 1080 (1954).

84. 22 Fed. Reg. 4362 (1957), inserting 20 C.F.R. §404.1501(d).

as preventing substantial gainful activity...."(85) Items on the list were quite brief and heavily dependent on judgmental terms (for example "Loss of use of two limbs," "severe loss of judgment").

In two amendments adopted in 1961, SSA took its first steps toward greater rule transparency. The first added the predecessor of the "medical appendix" -- a set of detailed instructions forefficiency. The measurement of visual acuity should include a report of refraction and be based upon the best corrected ascertaining the relative "severity" of various classes of medical impairments.(86) Detailed as they are, the instructions still relied almost exclusively on judgmental concepts and nonexclusive lists of decisional factors. For example:

> §404.1512 Impairments of vision and hearing.
>
> (a) Visual impairments. In measuring visual efficiency, the primary factors considered are central visual acuity, field of vision and muscle function. The determination of visual capacity depends upon accepted methods of measuring visual acuity for distance and near vision. Central fields may also be done where indicated but are not satisfactory unless accompanied by a report of peripheral field. Peripheral field of vision should be measured by use of the perimeter with suitable distance and test object.(87)

No threshold level of performance is specified for any of the impairments listed.

The second rule introduced the "work test" for determining whether work performed during the period of the alleged disability demonstrates ability to perform "substantial gainful activity."(88) While these rules rely primarily on a list of

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85. Id.

86. 26 Fed. Reg. 5572 (1961), inserting 20 C.F.R. §§404.1510-.1519.

87. 20 C.F.R. §404.1512 (1962).

88. 26 Fed. Reg. 11049 (1961), inserting 20 C.F.R. §§404.1532-.1537.

judgmental factors to be considered (for example, whether duties performed were "significant"(89) or job performance was "adequate"(90)), they do contain an earnings criterion phrased as a presumptive test:

> (b) Earnings at a monthly rate in excess of $100. An individual's earnings from work activities averaging in excess of $100 a month shall be deemed to demonstrate his ability to engage in substantial gainful activity in the absence of evidence to the contrary.(91)

Congress made two changes in the early 1960's to liberalize eligibility: one (eliminating the age-50 minimum(92)) reduced transparency, the other (substituting "12 months" for "indefinite duration"(93)) enhanced it. By the late 1960's, however, the tide had turned. Alarmed at the steadily rising costs of DI, Congress rewrote the disability definition in 1967 in an effort to tighten the "substantial gainful activity" and "physical or mental impairment" tests.(94) SSA responded with a complete overhaul of its regulations.(95) While they made some modifications to the "gainful activity" and "work test" provisions, the criteria for determing SGA remained clouded in imprecise verbiage.

The 1968 rules' major contribution to transparency was the introduction of the "medical appendix."(96) The medical appendix differed from the 1961 version in three crucial respects. First, it was far longer (by a factor of three) and more detailed. Second, it relied far more extensively on objective measures of bodily function. (The visual acuity section, for example, contained a table and chart for measuring loss of visual function in precise mathematical terms based on specified testing

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89. 20 C.F.R. §404.1533 (1962).

90. 20 C.F.R. §404.1532(c) (1962).

91. 20 C.F.R. §404.1534 (1962).

92. Pub.L. 86-778 (1960).

93. Pub.L. 89-97 (1965).

94. Pub. L. 90-248, 81 Stat. 869 (1967).

95. 33 Fed. Reg. 11749 (1968).

96. 20 C.F.R. §404.1539 Appendix (1969).

procedures.)(97) Third, and most important, the Appendix, rather than simply describing criteria for assessing relative severity, defined threshold impairment levels that would constitute presumptive evidence of disability. The medical appendix thus represents a huge step in the direction of an objective test for disability. Amendments to the Appendix since 1968 have pushed even further in that direction.

Despite this objectification of PMI criteria, the SGA test and its relationship to PMI remained obscured in much more open-textured language. Another massive overhaul of the rules in 1978 attempted to change that.(98) The 1978 amendments made two principal contributions: the "sequential evaluation" rule and the "grid."

The "sequential evaluation" rule(99) codified an approach for integrating medical and vocational factors that had evolved over the previous decade. This approach takes the form of a step-wise decision rule in which the disability decision is determined by the answers to a sequence of questions:

1. Has the applicant engaged in SGA during the period of alleged disability; (If so, he is not disabled.)

2. Does the applicant have a "severe" impairment? (If not, he is not disabled.)

3. Does the applicant have an impairment that meets the duration requirement and meets or equals the severity levels described in the medical appendix? (If so, he is disabled.)

4. Does the applicant's impairment preclude him from performing "past relevant work"? (If not, he is not disabled.)

5. Do the applicant's residual functional capacity and vocational capabilities permit him to perform a "significant number of jobs in the national economy"? (If so, he is not disabled.)

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97. Id. Appendix §2.09.

98. 43 Fed. Reg. 55349 (1978).

99. 20 C.F.R. §404.1503 (1979).

The decision rule is thus a group of per se subrules hierarchically arranged. At each level, one asks a yes-no question, one of whose answers disposes of the case, while the other answer forces inquiry to the next lower level. At the first four levels, the outcome is determined by a single factor (actual SGA, "severity" of impairment, "past relevant work"). Only at the fifth and last must the decisionmaker determine how to integrate the medical and vocational factors. Guiding that decision is the function of the 1978 rule's other major innovation -- the "medical-vocational grid."(100)

The "grid" is a four-dimensional matrix that defines the relationship among four medical-vocational variables (the claimant's "exertional capabilities," "education," "age," and "previous work experience"). The rules define a small number of possible values that each of these variables can take. For example, there are four "age" categories ("advanced," "closely approaching advanced," "younger (45-49)," and "younger (18-44)") and three "experience" values ("unskilled or none," "skilled or semiskilled--skills not transferable," and "skilled or semiskilled--skills transferable"). Finally, the grid specifies the decision ("disabled " or "not disabled") associated with most combinations of these variables.

In principle, at least, the grid is simple to use. The decisionmaker first classifies the applicant into the appropriate category under each of the four medical-vocational headings. He then selects the table appropriate to the applicant's residual functional capacity, reads down the "age," "education," and "experience" columns to find the appropriate values, and reads the corresponding entry in the "decision" column.

The evolution of the disability insurance eligibility standards has thus followed a relentless progression toward increased transparency and complexity. Hard quantitive measures have replaced soft, judgmental adjectives. Absolute thresholds have been established for continuous variables. Balancing operations have yielded to a hierarchy of on-off levers. Yet, if the rule contains many more hard edges than before, it still contains many soft ones as well. Like a prime steak, it is marbled with discretionary judgments, such as the threshold "severity of impairment" determination,(101) or the "equivalency" assessment for impairments not precisely described in the medical

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100. 20 C.F.R. Subpart P, Appendix 2 (1979).

101. 20 C.F.R. §404.1503(c) (1981).

appendix,(102) or the classification of a claimants' "residual functional capacity."(103) Yet despite these very considerable residual pockets of discretion, there can be little doubt that, over a very great range of its effective operation, the rule has been rendered far more transparent for its users. At the same time, however, the rule has grown immensely more complex. The disability criteria now fill 64 pages of the Code of Federal Regulations and many thousands more in administrative instructions, bulletins, interpretations and precedents. Their application, moreover, often requires complex or expensive tests, examinations, or measurements.

The factor most obviously responsible for this trend is transaction costs.(104) The volume of determinations is immense and until quite recently was growing at a rapid rate. Even as the number of initial claims has leveled off, the number of demands for reconsideration, hearings, and appeals has continued to grow unabated, as the following table indicates.

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102. *Id.* §404.1503(d).

103. *Id.* §404.1505.

104. Since the rule are intended solely to characterize a status resulting from an unexpected and presumably unwanted cause, their evaluation cannot plausibly be related to any compliance-related goals. Their only significant possible behavioral objective would be to discourage malingerers from filing claims, an effect that would be reflected in a direction of transaction costs.

DI CASES PROCESSED
BY LEVEL (FY 1976 and FY 1980)(105)

	Number of Decisions (in 000's)	
	FY 1976	FY 1980
Initial Determinations	1236.8	1038.9
Denials	754.8	696.1
Denial rate	61%	67%
Reconsiderations	223.0	311.7
Denials	169.6	265.0
Denial rate	76%	85%
ALJ Decisions	110.4	172.5
Denials	59.9	72.5
Denial rate	54%	42%
Appeals Council Decisions	27.8	37.6
Denials	26.2	32.7
Denial rate	94%	87%
Judicial Decisions	4.5	6.7
Denials	3.8	3.2
Denial rate	84%	48%

Although the estimated cost per claim of processing all DI claims is quite modest ($171 in 1978(106)), the cost per contested claim is a good deal higher.(107) Further, even at $171 per claim, the total cost of the 1.2 million claims processed in 1978 amounts to $205 million.

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105. Sources: Status of the DI Program, *supra* note 80 at 18, 31; Admin. Conference of the U.S., Federal Administrative Law Judge Hearings, Stat. Rep. for 1976-1978 at 321-24 (1980); 1977 SSA Ann. Rep. 19. Data for reconsiderations and all subsequent steps include continuing disability investigations as well as review of initial determinations.

106. 1978 SSA Year in Review: Administration of Social Security Programs 12.

107. One study estimated the cost per hearing at $500 to $1000. Mashaw *et al.*, *supra* note 77, at 15.

Raw numbers like these do not, however, do full justice to the power of the transaction cost factor. One of the major "hidden" transactional costs in a benefits system is the impact of delay on deserving applicants. The 480 thousand applicants who received a favorable decision at the initial application stage in 1976, for example, had to wait an average of 110 days for the award.(108) The 50 thousand who prevailed after an ALJ hearing had to wait an average of 249 days.(109) The human cost, in terms of anxiety and deprivation, represented by such delays is obviously enormous.

A second hidden transactional cost is the difficulty of controlling subordinate decisionmakers A substantial degree of *de facto* decentralization is unavoidable in so enormous an operation. But the structure of the DI program pursues decentralization with a vengeance. Initial decisions (and what amount to final decisions in the 85 percent of cases not appealed to SSA) are made by officers of 50 autonomous state agencies subject to only indirect supervision by SSA. These agencies are themselves often administratively decentralized and often rely heavily on consulting physicians and vocational experts. Within SSA, decisions are made by a cadre of some 700 often fiercely independent ALJS who preside at hearings with no representative of SSA usually present.(110) Any decisionmaking apparatus so fragmented--especially one whose decisions commit the expenditure of such vast sums of money and have a capacity to salve so much human suffering -- cries out for tight centralized control. Recent studies documenting high levels of apparent inconsistency among states or ALJS have further fueled these pressures.(111)

Demands for central control naturally focus attention on the clarity of substantive standards. The utility of conventional management control devices like reporting systems, performance appraisal, and quality review -- and SSA has developed them all to a refined art(112)--ultimately depend on the clarity of the

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108. 1977 SSA Ann. Rep. 23. The 480,000 figure was computed from data in the table at note 105 *supra*.

109. *Id*. at 52.

110. Admin. Conference of the U.S., *supra* note 105, at 21.

111. *See e.g.*, 1976 GAO Study; SSA Consistency of Initial Disability Determinations 1, 12 (1980).

112. SSA's quality control system is described in Chassman & Ralston, Social Security Disability Hearings: A Case Study in Quality Assurance and Due Process, 65 Cornell L. Rev. 801 (1980).

underlying standards to be applied.(113) It is one thing to document inconsistency of result (by, for example, comparing two individuals' resolution of a hypothetical case). But it is very difficult to remedy that inconsistency without having clear decisional criteria. Without the dramatic increase in regulatory objectivity, SSA's massive quality control program -- and its impressive gains, as measured at least by quantitative productivity(114) --would be almost unthinkable.

Such extreme transparency is usually bought at a high price, paid in the currency of incongruity or ex ante rulemaking costs. To take the latter first, the development of SSA's elaborate scheme has indeed been costly. The development costs probably measure in the hundreds of millions. But failure to develop generic criteria would merely postpone, not avoid, rulemaking costs. The administration of this program has always demanded a high level of justification for individual decisions. Disappointed recipients are entitled to explanations of increasing thoroughness and coherence at successive levels. Formal hearing procedures (at the ALJ stage) and searching judicial review have conspired to maintain a particularly rigorous justificatory on those who would deny claims at the appellate stage. A claims-processing system as legalistic as this one will reward a very heavy initial investment in a priori rulemaking, by reducing the cost of meeting its subsequent explanatory obligation.

The incongruity argument is more troublesome. The current rules undoubtedly miss their target quite frequently.(115) Automatic disqualification of claimants engaged in gainful work

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113. See R. Dixon, Social Security Disability and Mass Justice 51 (1973).

114. For example, processing time has dropped steadily in recent years. The mean time for initial awards dropped from 110 days in 1976 to 85 days in 1978. 1978 Year In Review supra note 106, at 12. Mean processing time for ALJ hearings fell from 249 days in 1976 to 145 days in 1979. 1979 SSA Ann. Rep. The "productivity index," SSA's overall measure of productivity in processing DI cases, increased from 100 in 1967 to 145 in 1976. 1978 Year In Review, supra note 106, at v.

115. For example, see Goldhammer, The Effect of the New Vocational Regulations on Social Security and Supplemental Security Income Disability Claims, 32 Ad. L. Rev. 501, 502-03 (1980).

must, by penalizing even superhuman efforts to overcome adversity, produce unjust results in some cases.(116) An automatic finding of disability for every condition in the medical appendix must at least occasionally discourage productive activity. Can it be true, as the grid tells us,(117) that no person in his late 40's who is unskilled, uneducated, and limited to sedentary work, can be "disabled"?

But to imagine horribles is not to estimate the weight they should exert on the choice of standard. The true cost of misclassifying a case depends on how close the case is to the "disabled"/"not disabled" boundary.(118) A regime that misclassifies 100,000 healthy malingerers or immobile quadriplegics is far more costly to society that one that misclassifies 100,000 persons with severely limited but partial function. The latter, if granted benefits, will forgo only limited productive effort, and, if denied, have some hope for independent support. The relevant question then becomes whether the unavoidable incongruities of a hard-edged rule cluster near the boundary, or near the extremes. Mashaw concludes that, under SSA's current regime, they cluster near the boundary,(119) and I agree. The step-wise decision rule starts at the extremes and moves toward the middle, knocking off most of the easy cases first, and reserving deeper and broader scrutiny for the closer cases. Intuitively, at least, the medical and vocational exhibit seems to embrace within the company of the disabled the most deserving cases. On this admittedly impressionistic level, then, the SSA rules seem to hold congruity costs within tolerable limits.

This brings us back one last time to transaction costs, however, since the rules achieve that result (if they do) only at the cost of enormous complexity. Does not the sheer number of decisional steps make up, in added fact-finding and interpretive efforts, for the savings effected by increasing the transparency

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116. See Liebman, The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of the Welfare Estates, 89 Harv.L.Rev. 832 (1976).

117. 20 C.F.R. Subpart P, Appendix 2, §201.17 (1981).

118. See Mashaw, How Much of What Quality: A Comment on Conscientious Procedural Design, 65 Cornell L. Rev. 823 (1980).

119. Mashaw, Administrative Due Process as Social-Cost Accounting, 9 Hofstra L. Rev. 1423, 1441 (1981).

of each? The answer here seems to be no. Most of the fact-gathering costs involved in the medical and vocational assessment would be incurred even under a far simpler standard. And since most cases raise only a few contestable issues, the overall complexity of the rules is less weighty than the accessibility and clarity of their relevant features. In these latter respects, SSA's rules receive a high score.

C. INS Change-of-Status Determinations

Section 245 of the Immigration and Nationality Act authorizes the Attorney General, "in his discretion and under such regulations as he may prescribe," to adjust the status of certain aliens to that of "an alien lawfully admitted for permanent residence."(120) The traditional channel for immigration to the United States is application to the American consul in the applicant's native country.(121) At one time, aliens present in the United States on a nonimmigrant visa (such as students or tourists) who wished to remain here permanently had to return to their native land to obtain an immigrant visa from the U.S. Consul, even if they were immediately eligible for such a visa.(122) The administrative creation of a special procedure for pre-examining applicants and routing them through American consular offices in Canada eased this burden somewhat. In 1952, Congress enacted Section 245 in order to eliminate even this unnecessary step.(123)

In order to qualify for adjustment of status, the applicant must meet several threshold statutory criteria:(124)

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120. 8 U.S.C. § 1255(a)(1980).

121. *See* 8 U.S.C. §§ 1101(a)(16), 1201 (1980).

122. *See* Sofaer, The Change-of-Status Adjudication: A Case Study of the Informal Agency Process, 1 J. of Legal Studies 349, 350-51 (1972).

123. Immigration and Nationality Act of 1952, c.477, Title II, ch. 5, § 245, 66 Stat. 217. In fact, the pre-examination procedure continued to be used until 1958 in "hardship" cases not covered by section 245. *See* Mailman, Move to Liberalize Adjustment of Status, 184 N.Y.L.J. 1, 3 (Aug. 5, 1980).

124. 8 U.S.C. § 1755(a)(i) (1980).

1. The applicant must have been "inspected and admitted or paroled into the United States;"

2. The applicant must be "eligible to receive an immigrant visa and (be) admissible to the United States for permanent residence" under applicable quotas and preferences; and

3. The applicant may not be a "crewman," may not have accepted "unauthorized employment prior to filing an application," and may not have been "admitted in transit without visa."

All of these criteria are either facially transparent or reasonably fully articulated by a history of interpretation.

What is neither transparent nor nearly as well articulated is the additional "discretionary" element of the determination. In delegating his authority to the Immigration and Naturalization Service (INS), the Attorney General made no effort to relieve the opacity of the statute's "discretionary" residue.(125) The INS, in turn, has taken only very modest steps in that direction. The Service's published regulations under Section 245 are utterly silent with regard to extra-statutory criteria for the exercise of discretion.(126) The Operating Instructions to District Directors contain only one explicit statement of criteria beyond the statutory minima:

> When the evidence establishes that the alien obtained his non-immigrant visa to evade the normal immigrant visa process and there are no substantial equities present in his case, the application should be denied in the exercise of discretion. Substantial equities are considered to exist in a case if the facts are such that the alien would be granted voluntary departure until he

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125. 8 C.F.R. § 2.1 (1981).

126. 8 C.F.R. Part 245 (1981).

> is invited to appear at an American consulate to apply for an immigrant visa; in such a case, the application should not be denied in the exercise of discretion.(127)

For further elucidation of the Service's discretionary criteria, one must look to the published decisions of INS District Directors and the Board of Immigration Appeals (BIA). Various students of immigration law have been able to discern at least some revealing patterns in their body of precedent.(128) For example, they have identified certain circumstances that the Service regards as "adverse factors" (such as a preconceived intent to seek permanent residence at the time of entry; misrepresentations made in the application; petty criminal conduct; illegal employment; and so on). "Equities" cited in support of an application, on the other hand, include such factors as a bona fide marriage and viable marital relation, substantial difficulties in resettling or returning to one's native land, and candor in dealing with the Service.

Beyond this unofficial and nonexclusive recitation of favorable and unfavorable factors, however, it is difficult to go. The BIA has at least clarified earlier doubts about the *de facto* burden of proof: in the absence of adverse factors, the

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127. INS Operating Instructions § 245.3b, *reprinted in* C. Gordon & H. Rosenfield, 4 Immigration Law & Procedure 23-522 (1981). "Voluntary departure" refers to a process by which the service may give a deportable alien a grace period within which to leave the country "voluntarily" prior to forcible expulsion. *See* 8 U.S.C. § 1252(b)(1980); Roberts, The Exercise of Administrative Discretion Under the Immigration Laws, 13 San Diego L. Rev. 144, 150 (1975). The incorporation by reference of the voluntary departure standards adds little to the transparency of the status-adjustment standards since most regulatory criteria for indefinite voluntary departure either duplicate status-adjustment eligibility criteria (*e.g.* admissibility or visa availability) or are themselves hopelessly opaque (e.g. "compelling factors warranting grant of voluntary departure"). *See* INS Operating Instructions § 242.10.

128. *See*, *e.g.*, C. Gordon & H. Rosenfield, *supra* note 127, at 7-19; Orlow, Adjustment of Status to Lawful Permanent Resident, in Tenth Annual Immigration and Naturalization Institute 151, 156-68 (A. Fragomen, Jr., ed. 1979).

application will usually be granted.(129) But the relative weights to be assigned to various factors, or even the criteria used to identify a circumstance as "adverse" or as an "equity," remain unspecified.

The Service has been criticized on numerous occasions for the relative opacity of its status adjustment standards. Professor Abraham Sofaer, for example, in a 1972 study sponsored by the Administrative Conference, presented rather compelling statistical and anecdotal evidence of inconsistency in the Service's exercise of discretionary authority.(130) Discretionary denials, he observed, were considerably more susceptible to political intervention and administrative reversal than denials based on the much more explicit statutory criteria.(131) While most courts have upheld Section 245's grant of discretionary power to the Attorney General (and its subdelegation to the INS),(132) a few judges have displayed unease at its breadth. Dissenting in *Ameeriar v. INS*, Judge Freedman of the Third Circuit characterized the Service's exercise of discretion as "an utterly unguided and unpredictable undertaking":

> Only the inevitable necessity of disposing of the case is specified, like a result without a cause. What is the desired goal and what guides should channel the course to it receive no recognition.(133)

In 1979 the Service made an effort to increase the transparency of its standards for granting status adjustments. An internal task force, chaired by the Associate Commissioner for Examinations, identified a number of areas in which the Service exercised broad discretion and developed proposed criteria for each. The project culminated in a notice of proposed rulemaking

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129. Matter of Arai, 13 I. & N. Dec. 494 (1970).

130. Sofaer, *supra* note 122, at 365-93.

131. *Id.* at 385-93.

132. *E.g.*, Faddah v. INS, 580 F.2d 132 (5th Cir. 1978); Marino v. INS, 537 F.2d 686 (2d Cir. 1973); Ameeriar v. INS, 438 F.2d 1028 (3d Cir. 1971).

133. 438 F.2d at 1042.

issued on June 21, 1979.(134) The stated purpose of the rule was "to assure that all applicants and petitioners receive fair and equal treatment before the Service."(135) The portion of the proposed rule dealing with status adjustment listed five adverse and five favorable factors, required adjustment in the absence of adverse factors, and stated a strong presumption against adjusting the status of any alien who had evaded the normal immigration process (absent "substantial equities").(136)

One might be tempted to dismiss these proposed rules as a mere codification of existing practice. Even to the extent that this is true, however, they make more visible and mandatory what had theretofore been largely suggestive or implicit. Furthermore, the proposed rules did go beyond previous precedent in some respects--for example, by making mandatory the presumption in favor of adjustment in the absence of adverse factors.(137) A more serious objection is the large pockets of opacity retained in the new formulation. Many of the factors listed are couched in vague language,(138) their enumeration is nonexclusive, and their relative weights are unspecified. At most, the proposed rule promised to provide little more articulation than the Service's elusive and inconclusive body of instructions and precedents.

Yet even this modest degree of policy clarification was too much for the INS. In a terse order issued on January 21, 1981, the INS announced its decision to cancel the proposed rule. Its only stated reason for abandoning the effort was:

> [I]t is impossible to foresee and enumerate all the favorable or adverse factors which may be relevant and should be considered in the exercise of administrative discretion. Listing some factors, even with the caveat that such list is not all inclusive, poses a danger that use of guidelines may become so rigid as to amount to an abuse of discretion.

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134. 44 Fed. Reg. 36187 (1979).

135. *Id.*

136. *Id.* at 36191 (*proposing* 8 C.F.R. § 245.8).

137. Matter of Arai, 13 I. & N. Dec. 494 (1970).

138. *E.g.*, "adverse foreign relations impact" (adverse factor) or "need for services in the United States" (favorable factor). 46 Fed. Reg. 9119 (1981).

> In the exercise of discretion, all relevant factors are considered. The adverse factors are weighed against the favorable factors in the judgment and conscience of the responsible officials. Service officials are required to prepare a record justifying their actions when they deny a benefit in the exercise of administrative discretion. Summary and stereotyped denials are not acceptable.(139)

The Service is, at least, consistent. Its explanations are no more transparent than its rules. In order to explain the mission's abortion, we must look behind the official explanation. An objection registered by several INS district officials was a fear of increased litigation. One particularly colorful comment predicted, for example, that:

> [T]he proposals embodied in this draft would subject the Service to a constant barrage of spurious appeal by Immigration attorneys on the basis of the semantics proposed to be injected into the regulations. They subvert Government to the vagaries of attorney dilatory tactics and would appear to tie our hands completely in the cobwebs of endless liturgical [*sic*?] dialogue.(140)

It is hard to take such an assertion seriously. If anything, the transacton cost factor cuts in precisely the opposite direction. The sheer volume of status-adjustment cases is staggering:(141)

Fiscal Year	Applications	Adjustments
1976	70,000	47,947
1977	90,450	54,523
1978	N.A.	101,397

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139. *Id.*

140. Memorandum from [name and position deleted], INS, to Lionel J. Castillo, Commissioner, INS, Sept. 12, 1978, p. 1.

141. INS, 1978 Stat. Yearbook.

Most individual applicants, moreover, have a sufficiently intense interest in the outcome of these cases to expend cosiderable effort on the process.(142) The Sofaer study showed that in the vast majority of cases (estimated at over 90 percent), a disappointed applicant seeks and obtains subsequent relief or forces the Service to take expensive enforcement action.(143) As a consequence, Professor Sofaer regarded the potential payoff from clearer rules, in terms of lower transaction costs, to be substantial.(144)

Enhanced clarity would, of course, entail additional ex ante rulemaking costs. But that investment would probably be repaid by the reduced explanatory burden imposed on individual INS adjudicators. The INS Operating Instructions require that discretionary denials not governed by applicable precedent be accompanied by a "full discussion of the favorable and unfavorable factors" considered.(145) Clearer rules could ease the search for applicable "precedent" and shrink the residual category of decisions requiring elaborate ad hoc justification. Another form of ex post rulemaking in which the Service presently invests is the selection of precedents for publication. The Service publishes only about 100 of the thousands of status-adjustment decisions rendered each year by its district directors.(146) The

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142. It is true that an alien whose application is denied for discretionary reasons can still apply for an immigrant visa at the American Consulate in his native land. But this option may entail considerable cost, including round trip transportation for the alien and his family, the delay, the risk of erroneous denial by the Consul, and in some cases exposure to military service or imprisonment at home.

143. Sofaer, supra note 122, at 396-97.

144. Id. at 421. The volume of adjustments has grown since the time of Sofaer's study (41,528 adjustments in 1970). Id. at 353. This is balanced, however, by a decline in the proportion of discretionary (as opposed to statutory) denials. Compare id. at 365 (35% of denials discretionary in 1970), with Orlow, supra note 128, at 157 (discretionary denials "rare" in 1979).

145. INS Operating Instructions § 245.5d(2), reprinted in C. Gordon & H. Rosenfield, supra note 127, at 23-533 to -534.

146. Interview with Paul Schmidt, Acting General Counsel, INS, Washington, D.C., December 17, 1980.

very act of selection consitutes a form of rulemaking that could be at least partially displaced by issuing clearer ex ante guidelines.

Clearer rules could achieve additional transactional savings for the agency by facilitating internal quality control. The decisionmaking process in status adjustment cases is--almost unavoidably--quite decentralized. In most cases,(147) initial decisions are rendered by relatively low-salaried officials called "Immigration Examiners" assigned to the Service's 36 district offices.(148) To control the work product of this far-flung legion of adjudicators, the INS relies primarily on two devices. The weaker instrument is an exhortation in its Operating Instructions that decisionmakers stay abreast of the selected precedents periodically published by the agency.(149) The stronger control is the system of hierarchical review.

All discretionary denials and any discretionary approvals in cases involving adverse factors are subject to mandatory review by a superior district officer.(150) In fact, according to one former General Counsel, district directors personally review and issue all status adjustment decisions.(151) In addition, denied applicants may request review at the district level by way of a motion to reopen or to reconsider, and may obtain de novo redetermination of their application at a deportation

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147. Nonimmigrant aliens may first apply for change of status at a deportation hearing. In that event, the initial determination is made by a Special Inquiry Officer ("immigration judge"). See C. Gordon & H. Rosenfield, supra note 127, at 7-23.

148. Sofaer, supra note 122, at 357, n.25. Most examiners are non-lawyers. Sofaer, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 Colum. L. Rev. 1293, 1299 (1972).

149. INS Operating Instructions § 245.5d(1), reprinted in C. Gordon & H. Rosenfield, supra note 127, at 23-531.

150. INS Operating Instructions § 245.5d(3) & (4), id. at 23-532.

151. Letter from Charles Gordon, INS General Counsel, to James J. Orlow, Esq., February 25, 1972, at 1.

hearing.(152) Issuance of more transparent decision rules should enable the Service to reduce the extent to which it relies on this elaborate system of review as a quality assurance mechanism.

Compliance considerations may also argue for clearer rules in this context. Every year untold thousands of aliens seek residence in the United States by a variety of unlawful means. Ambiguous criteria for adjusting the status of nonimmigrant visitors could encourage would-be immigrants to evade the usual immigration channels. A critical determinant for assessing the weight of this factor is the extent of aliens' familiarity with immigration law. Clear standards have little compliance value if physical remoteness or cultural barriers block their communication to the intended audience. This condition may be especially prevalent in immigration law generally. Yet, it is less plausibly characteristic of status-adjustment standards than, say, admissibility standards, since the former's audience is at least physically present in the United States and has already "worked the system" to the extent necessary to obtain a non-immigrant visa. Since status adjustment is a privilege that an alien must affirmatively request, it is probably reasonable to assume at least a moderate level of familiarity with the governing standards. Also, the rate of representation at status-adjustment interviews is quite high.(153)

Even if the audience is knowledgeable, however, greater clarity may not have important compliance-inducing consequences. The main behavioral concern of the program is illegal or evasive entry. The statute addresses this problem explicitly by conditioning eligibility for status-adjustment on admissibility and immediate visa eligibility.(154) Those criteria are reasonably clear (and, in any event, are not the object of our immediate scrutiny). The residual "discretionary" judgment, on the other hand, may be designed not to induce any particular behaviors, but rather to recognize the existence of a condition or

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152. See Orlow, supra note 128, at 165-167. Denial by an immigration judge (at the deportation stage) is appealable to the Board of Immigration Appeals and a Court of Appeals. Id. at 167.

153. Sofaer, supra note 122, at 359-60 (at least 44% of all applicants in sample had representatives; 60% of all aliens denied relief had representation).

154. 8 U.S.C. § 1255(a) (1980).

its absence. To the extent that this is true, the compliance-inducing function of rule clarity would simply drop out of the equation.

This last line of reasoning invites attention to the statute's purposes. That inquiry is also essential, of course, to weighing the potential costs of incongruence that might result from a clearer standard. The Service seemed to regard incongruity risks as the decisive argument against the 1979 proposal. Section 245, it seemed to be saying, does not merely permit, but requires the exercise of "discretion." But why? It is far from clear what Congress had in mind in adding the discretionary element. The statutory eligibility conditions seem to address the most obvious concerns (for example, excluding "misfits" or preventing an evasion of quotas). One can imagine three possible reasons for further limiting access to status adjustment: 1) to preserve the integrity of the normal immigration process by forbidding end runs; 2) to assure harmony between status-adjustment policy and our relations with a foreign country; or 3) to limit status adjustment to persons likely to make a particularly positive contribution to society. The first of these purposes surely lends itself to a reasonably transparent rule, and the second justifies at most a separate rule (or exception from the standard approach) for nationals of designated countries with whom our bilateral relations require a distinct policy.

The third hypothesized statutory objective provides a more plausible justification for resisting rule clarification. Assessing a person's prospective value to society, so the argument runs, is a holistic judgment that cannot be reduced to a formula. In the words of one INS official:

> [T]he diversity of human activities tends to continually generate new factors and issues which should logically affect the exercise of discretion.(155)

At most, however, this argument demands the preservation of some open texture in the standards. An unweighted, nonexclusive list of factors, such as was proposed in 1979, surely leaves plenty of room for the play of conscience.

In rejecting even that modest effort at articulation, the Service seems to go beyond an apology for discretion by saying that discretion is a positive good, not simply an absence of law.

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155. Memorandum from [name and position deleted], INS, to Lionel J. Castillo, Commissioner, INS, Sept. 15, 1978, at 1.

Perhaps the Service has in mind a notion akin to Professor Tribe's "structural due process" model(156) or Professor Mashaw's "moral judgment" model.(157) Central to these models is the injunction that, when making moral judgments about a person, the state must permit him to participate in the articulation of the very standards to be applied to his case. Reliance on an antecedent rule effectively precludes that participation.

At heart, this model rests on a theory of justice quite different from the utilitarian approach on which the present study is based, and this is not the place to argue their respective merits. But even on its own terms, it seems inapplicable to the present context. Status adjustment is not characteristically a contest of relative "deservedness" or a determination of "culpability."(158) Nor is it usually the focal point for a clash of fundamental values.(159) While outcomes occasionally turn on the applicant's moral character,(160) most of the reasons conventionally invoked for discretionary grant or denial surely lend themselves to greater clarification without offending the applicant's humanity.

D. Labor Certification of Immigrant Aliens

Federal immigration law has long contained provisions designed to protect domestic workers from the entry of aliens into the labor force. The Immigration and Nationality Act of 1952 permitted aliens to enter the country for the purpose of performing labor unless the Secretary of Labor determined that such entry would have an adverse effect on the domestic labor force.(161) So phrased, the Act effectively placed the burden on the Secretary to prevent entry (or on domestic workers to

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156. Tribe, Structural Due Process, 10 Harv. C.R.-C.L.L. Rev. 269 (1975).

157. Mashaw, Conflict and Compromise Among Models of Administrative Justice, 1981 Duke L.J. 181, 188-90.

158. *Id.* at 188-189.

159. Tribe, *supra* note 156.

160. *E.g.*, Matter of Francois, 10 I. & N. Dec. 168 (1963).

161. Immigration and Nationality Act of 1952, § 214(a)(14), Pub. L. 82-414, 66 Stat. 153, *codified as amended at* 8 U.S.C. § 1182(a)(14)(1980).

challenge entry). During the period 1952-1965, such challenges were extremely rare.(162) Concerned about the virtually unrestricted entry of aliens into the workforce, Congress amended the Act in 1965 to shift the burden to the alien (or, as a practical matter, his prospective employer) to demonstrate an absence of adverse impact.(163) The present statute restricts entry by excluding:

> Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.(164)

The substantive standard for certifiability (virtually unchanged since 1952) is a commendably transparent illustration of the legislative draftsman's art. To receive certification, the job opportunity must satisfy two independent conditions: 1) an insufficient number of domestic workers "able, willing, qualified, and available" for the job, and 2) no "adverse effect" on domestic workers' wages and working conditions. The draftsman even specified the time and location for testing availability.

The statute delegated to the Secretary of Labor the task of deciding how to ascertain availability and adverse impact in particular cases. The Secretary's initial reponse was to promulgate a rule establishing two "schedules" -- Schedule A, a short list of undersupplied occupations for which certification would be automatic, and Schedule B, a longer list of oversupplied

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162. See Rodino, The Impact of Immigration on the American Labor Market, 27 Rutgers L. Rev. 245, 252-53 (1974).

163. Immigration and Nationality Act of 1965, Pub. L. 89-225, § 10, 79 Stat. 917.

164. 8 U.S.C. § 1182(a)(14)(1980).

occupations for which certification was precluded.(165) For job titles falling within these two lists, the Secretary's drafting technique was a paragon of transparency. For the far more numerous occupations not encompassed within the two schedules, however, the regulation merely tracked the statutory language.

Two years later (1967), the Secretary amended the rule to specify criteria for determining "adverse impact" on domestic workers' wages and working conditions.(166) A job offer would be deemed to have such an impact if the wage were below the prevailing wage for that occupation in the locality and if the working conditions were less favorable than those extended to domestic workers by the same employer. This rule included a highly detailed definition of "prevailing wage." For the next 10 years, the only amendments to the substantive standard involved Schedules A and B.(167) Aside from minor adjustments and refinements in the listed occupational categories, the most significant change was the relaxation of Schedule B's flat prohibition in 1971, by authorizing applicants for Schedule B jobs to seek a waiver in individual cases.(168) No criterion for waivers was specified. This transparency-reducing amendment reflected concern for the overinclusiveness of a flat nationwide prohibition.

In the meantime, the Department of Labor (DOL) provided no further guidance on how to ascertain the "availability" of workers in unscheduled occupations except 14 pages of "Guidelines" and various supplementary memoranda issued by the Manpower Administration to its regional offices and to state job

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165. 30 Fed. Reg. 14979 (1965), codified as amended at 20 C.F.R. §§ 656.10-.11 (1981).

166. 32 Fed. Reg. 10932 (1967).

167. *See* 31 Fed. Reg. 16412 (1966); 33 Fed. Reg. 12808 (1968); 36 Fed. Reg. 2462 (1971).

168. 36 Fed. Reg. 2462 (1971), codified as amended at 20 C.F.R. §§ 656.11(c), 656.23(d)(1981).

service agencies.(169) These materials specified, among other things, that general labor market data for the locality in question should be utilized to test domestic worker "availability." Using this method, regional offices denied certification in roughly one of every two cases.(170)

The failure of the Department to publish its criteria for testing "availability" resulted in public criticism of the agency for relying on "secret" policy.(171) The Manpower Administration did issue a revised field memorandum in 1973,(172) but criticism of the agency's lack of published criteria continued to mount.(173) A growing number of reviewing courts, moreover, found the aggregate labor market test an inadequate basis to establish domestic workers' availability.(174)

The Department completely overhauled its rules in 1977,(175) establishing a new method to test worker availability -- individual recruitment efforts by the prospective employer. The

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169. Administrative Conference of the U.S., Recommendation No. 73-2, 38 Fed. Reg. 16840 (1973).

170. Id. (60,000 applications received in 1972; 30,000 denied).

171. Wasserman, The Labor Certification Program, Its Deficiencies and Appellate Review, 49 Interpreter Releases 161, 162 (1972). See also Administrative Conference of the U.S., supra note 169; H.R. Rep. No. 93-461, 93d Cong. 2d Sess. (1973).

172. Manpower Admin., U.S. D.O.L., Field Memorandum No. 378-73 (Dec. 3, 1973), described in Rubin & Mancini, An Overview of the Labor Certificaton Requirement for Intending Immigrants, 14 San Diego L. Rev. 76, 87 (1976).

173. See, e.g., Gordon, The Need to Modernize Our Immigration Laws, 13 San Diego L. Rev. 1, 11 (1975); Comptroller General, House Comm. on the Judiciary, Administration of the Alien Labor Certification Program Should be Strengthened 23 (May 16, 1975); ABA, Section of Admin. Law, Comm. on Immigration & Nationality, Report and Recommendations (May 1976).

174. E.g., Seo v. United States Dept. of Labor, 623 F.2d 10 (9th Cir. 1975); Shuk Yee Chan v. RMA, 521 F.2d 592 (7th Cir. 1975); Digilab, Inc. v. Secretary of Labor, 495 F.2d 323 (1st Cir.), cert. denied, 419 U.S. 840 (1974).

175. 42 Fed. Reg. 3441 (1977).

rules specified in considerable detail the steps that an employer had to take to demonstrate an adequate market test (for example, general advertising, posting of a job notice in the workplace, listing the job with the local state job service agency).(176) Satisfaction of these recruitment requirements was a necessary (but not a sufficient) condition for certification. The regional certifying officer still had to find that the statutory criteria were satisfied.(177) As a practical matter, however, satisfaction of the recruitment procedures has generally been treated as sufficient evidence of domestic worker unavailability.

The painstaking detail of the 1977 rules generated somewhat contradictory pressures for further reform. On the one hand, the new provisions, despite their apparent high transparency, raised many new questions of interpretation at the margins. For example, for how long and where in the workplace must the employer post the required job notice?(178) Does the ban on unduly restrictive "requirements"(179) in the job advertisement (for example, "ability to speak Spanish required") also include "preferences" ("ability to speak Spanish preferred")? On the other hand, the 1977 rules were criticized by employers and some DOL officials as excessively rigid, often forcing employers to suffer needless expense and delay to establish domestic worker unavailability.(180) In the words of a recent program director, the 1977 rules "eliminated the discretion that was needed to do the right thing".(181)

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176. 20 C.F.R. §§ 656.21(b), (g)(1981).

177. 20 C.F.R. § 656.24(b)(2) (1981).

178. See 20 C.F.R. § 656.21(b)(10)(1981).

179. See 20 C.F.R. § 656.21(b)(8)(1981).

180. See Booz, Allen & Hamilton, Inc., Study of the Permanent Labor Certification Program Administered by the U.S. Department of Labor and State Employment Security Agencies at I-4 (Sept. 1980) [hereinafter cited as Booz Allen study].

181. Interview with Aaron Bodin, Chief, Division of Labor Certifications, U.S. Employment and Training Admin., DOL, Washington, D.C., December 16, 1980.

These twin pressures spawned a further overhaul of the rules in 1980.(182) Most of the 1980 amendments provided further elaboration of earlier language. For example, the external advertising requirement was rewritten to specify the timing, duration, and type of media to be used.(183) Similarly, the amended "internal posting" rule now requires the employer to post a "clearly visible and unobstructed" notice in a "conspicuous place" for at least "ten consecutive days."(184) An amusing comment in the preface to the 1980 rules reveals that, despite this penchant for precision, the Department does have its limits:

> A number of State job service agencies and ETA regional offices requested that the minimum size be specified for a posted notice. DOL has determined not to regulate the size of the notice with such specificity.(185)

While most of the amendments increased the complexity and transparency of the labor certification rules, the 1980 revision did contain two provisions designed to relax the rule's rigidity. One authorizes certifying officers to "reduce the employer's recruitment efforts" required by the existing rules "if the employer satisfactorily documents that the employer has adequately tested the labor market with no success at least at the prevailing wage and working conditions."(186) The second authorizes certifying officers to excuse "harmless error" in the employer's failure to comply with the rule's detailed recruitment procedures, but only if "the labor market has been tested sufficiently to warrant a finding of unavailability and lack of adverse effect."(187)

Despite these rather tentative efforts at "defixing" the rules, the labor certification rules have evolved to a state of high complexity and transparency. One plausible explanation for

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182. 45 Fed. Reg. 83928 (1980).

183. See 20 C.F.R. § 656.21(g) (1981).

184. See 20 C.F.R. § 656.21(b)(3)(1981).

185. 45 Fed. Reg. 83930 (1980). "ETA" is the Employment and Training Administration.

186. 20 C.F.R. § 656.21(i)(1981).

187. 20 C.F.R. § 656.24(b)(1)(1981).

this is the relative significance of transaction costs in this program. The volume of cases is quite large (54,000 in 1979).(188) The time and effort expended in processing so large a caseload is surely an important consideration in the design of the substantive rules. The 1977 rules appear to have had only mixed success, however, in reducing processing costs. It is true that the number of applications fell (from 60,000 to 50,000 per year) after 1977.(189) At the same time, the certification rate rose (from 65 to 90 percent).(190) This suggests that the increased clarity of the rules did discourage more nonmeritorious applications. But, the time (in both chronological and person-hour terms) required to process cases rose after 1977.(191) This appears to be attributable partly to the rules' substantive shift (from an aggregate labor market test to individualized recruitment) and partly to their increased complexity. Decisionmakers must now ascertain compliance with a larger number of specific requirements. A contributing factor is the increase in the percentage of employers represented by attorneys after 1977.(192) In addition to the increase in transaction costs inherent in the greater use of attorneys, attorneys tend to exploit more effectively the unavoidable ambiguities of rules, thereby prolonging the decisional process.

A second form of transaction cost is the cost of maintaining internal quality control. The program is administered in a decentralized fashion.(193) Applications are initially processed by the state job service agencies (units within federally supported employment security agencies). All but two states further decentralize this processing function to their local or regional offices.(194) After preparing the files, the state agencies transmit them to "certifying officers" in the ten DOL regional offices who make the actual determinations.

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188. Booz Allen Study, supra note 180, at iii.

189. See Rubin & Mancini, supra note 172, at 78.

190. Booz Allen Study, supra note 180, at IV-10.

191. Bodin interview, supra note 181.

192. Id.

193. For a description of the process, see Rubin & Mancini, supra note 172, at 81-89; Booz Allen Study, supra note 180, chs. II-III.

194. Booz Allen Study, supra note 180, at II-3.

The difficulty of maintaining consistency in so geographically and jurisdictionally far-flung an empire strongly recommends the use of bright-line standards. By this measure, the 1977 rules were reasonably successful. Although a 1980 study commissioned by DOL (the Booz Allen study) found "considerable diversity in labor certification operations among state Job Service agencies" and "to a lesser extent" among DOL regional offices, it concluded that "the overall implications of this diversity are . . . small."(195) Nonetheless, it was concern about this diversity that obviously animated many of the 1980 amendments. Indeed much of the pressure for further clarification and opposition to rule relaxation came from the state and regional officials charged with administering the program.(196)

Compliance problems are also likely to be especially acute in a program of this sort. Both aliens and employers often have strong motivation to violate the law (for the alien, to obtain employment and the means to remain in the country; for the employer, to obtain cheap labor). The regulated activity, moreover, is highly dispersed and inconspicuous (although domestic workers and their unions can often be counted on to alert DOL to violations). These factors provide an additional incentive for objectifying the governing criteria. The success of the 1977 rules in achieving this objective is difficult to judge since DOL lacks reliable data on the overall rate of compliance, but the hypothesis seems plausible.(197)

Whatever gains the 1977 rules have achieved in reducing transaction costs and increasing compliance must be balanced against the evidence of their over- and underinclusiveness. Concern about overinclusiveness (excessive employer recruitment requirements) motivated the "recruitment reduction" and "harmless error" amendments.(198) Perhaps even weightier are the apparent underinclusiveness losses of certifications incorrectly issued. The Booz Allen study concluded that the 1977 rules "do not ensure that an effective test of the labor market is made."(199)

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195. *Id*. at ii.

196. *See*, *e.g.*, 45 Fed. Reg. 83930-32 (1980).

197. The Booz Allen Study concluded that the process established by the 1977 rules "probably deters a number of applicants who realize they could not meet the requirements." Booz Allen Study, *supra* note 180, at vi.

198. *See* notes 188-187 *supra*.

199. Booz Allen Study, *supra* note 180, at IV-5.

Although the required recruitment process effectively exposes domestic workers to the jobs for which certification is sought, domestic workers are almost never hired in preference to the applicant alien. The evidence strongly suggests that many employers are merely going through the motions without seriously considering hiring the domestic applicants produced by the procedure.(200)

On the surface, it is hard to blame the rule itself for this condition, since it specifically forbids certification to an employer who has rejected a domestic worker's application for any reason other than a "lawful job-related" reason.(201) This provison represents a softening of the Department's previous (albeit unpublished) hard-edged policy of presuming domestic worker availability for a particular job based on aggregate labor market data. Several courts had sharply criticized that policy as excessively overinclusive.(202) But the attempt in 1977 to substitute a more individualized test of worker availability has apparently succeeded only in replacing overinclusiveness errors with underinclusiveness errors. The reason offered in the Booz Allen study is transaction costs. Certifying officers, the study concluded, find it "time consuming and difficult" to challenge employers' justifications for rejecting domestic applicants.(203) Under caseload pressures, in other words, even facially congruent opaque formulations can produce substantial incongruities.

The social cost of this underinclusiveness may not be especially great, however. Schedule B excludes aliens (unless they can obtain a waiver) from low-skilled occupations for which domestic demand is likely to be sufficient. The Booz Allen study found, moreover, that the certification process effectively protects domestic workers' wage rates.(204) Finally, the

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200. Id.

201. 20 C.F.R. § 656.21(b)(15)(1981).

202. E.g., Ratnayake v. Mack, 499 F.2d 1207 (8th Cir. 1974); Digilab, Inc. v. Secretary of Labor, 495 F.2d 323 (1st Cir.), cert. denied 419 U.S. 840 (1974); Reddy, Inc. v. Department of Labor, 492 F.2d 538 (5th Cir. 1974). Contra, Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C. Cir.), cert. denied, 95 S.Ct. 525 (1974).

203. Booz Allen Study, supra note 180, at IV-13.

204. Id. at ii.

extensive recruitment effort demanded by the 1977 amendments undoubtedly deters many employers from abusing the system. The cases that slip through the net, then, are likely to be the least serious in their impact on domestic employment.

The evolution of the labor certification rules is an object lesson in the dynamics of regulatory precision. In particular, it reveals the elusiveness of rule transparency. The original job schedules were a highly transparent gesture. Yet, their very clarity tended to magnify the opacity of the standards governing unscheduled jobs. Similarly, 1977's quantum leap in precision generated pressure for even greater elaboration. Yet even now the program is bedeviled by pockets of opacity such as the "job-related" reasons criterion for rejecting domestic job applicants. Yet, it appears unlikely that further increases in transparency would materially strengthen program effectiveness. The rule's history demonstrates how increases in transparency and complexity generate countervailing pressures for relaxation. The introduction of waivers from Schedule B in 1971 and the "recruitment reduction" and "harmless error" amendments of 1980 symbolize the difficulty of eliminating discretion altogether, even in a highly decentralized, heavy-caseload program such as the labor certification process.

E. The SEC's "Safe Harbor" Rules for Resale of Unregistered Securities

The Securities Act of 1933 generally prohibits the public sale of "unregistered" securities -- that is, securities with respect to which no registration statement has been filed with the SEC.(205) A registration statement contains detailed financial, operating, and ownership information about the company issuing the securities (issuer).(206) The Act exempts private securities offerings from the registration requirement.(207) Since purchasers at private offerings -- often the issuer's incorporators, officers, directors, and their associates -- are usually knowledgeable and sophisticated investors, the Act's public information requirements are considered unnecessary in that

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205. Securities and Exchange Act of 1933, § 5, codified at 15 U.S.C. § 77e (1980).

206. 15 U.S.C. § 77f (1980). For an analysis of the Act's disclosure requirments, see Anderson, The Disclosure Process in Federal Securities Regulation: A Brief Review, 25 Hastings L.J. 311 (1974).

207. 15 U.S.C. § 77d(2)(1980)(exempting "transactions by an issuer not involving any public offering").

context. An important question then arises whether and under what circumstances purchasers at a private sale may resell unregistered securities to the public. An absence of restrictions could permit easy circumvention of the registration requirement, while a flat prohibition would impair the value of privately issued securities by seriously restricting their liquidity.

The statute is not particularly instructive in resolving this common problem. The area of greatest uncertainty involves the definition of "underwriter," since the Act exempts transactions by persons "other than an ... underwriter."(208) The definition of "underwriter" leaves considerable room for doubt about its application to resellers. An "underwriter" is a person who purchases from an issuer "with a view to ... the distribution" of a security.(209) If the resale of an unregistered security to the public were considered part of its "distribution," the sale would expose the seller to civil and criminal liability. It has fallen to the Securities and Exchange Commission, as the Act's principal interpreter and enforcer, to resolve that uncertainty. With respect to the prohibition against public sale of unregistered securities, the SEC has both a prosecutorial and a legislative role. It may initiate a civil or criminal enforcement action against an alleged violator,(210) and it has explicit authority to insulate transactions against collateral attack in a private suit.(211)

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208. 15 U.S. § 77(d) (1980). The meaning of "issuer" can also present interpretive difficulties in the context of resale by a person or entity controlled by or exercising control over the issuer. If such a person were to be treated as the "issuer," the public resale would be considered a public issue requiring registration. This case study focuses primarily on the "underwriter" (conduit) problem rather than the "issuer" (control) problem.

209. 15 U.S.C. § 77(b)(11)(1980).

210. 15 U.S.C. § 77(1)(1980).

211. 15 U.S.C. § 77(s)(1980).

For the first four decades of its existence, the SEC interpreted the "underwriter" exemption primarily through the vehicle of "no-action" letters.(212) Prospective resellers of unregistered securities could seek formal clearance for the proposed transaction, in the form of a letter from the SEC's staff announcing its binding commitment not to take enforcement action based on the transaction. Most no-action letters issued from the Commission's Division of Corporation Finance (hereinafter "Division"), although a few were approved by the Commission itself. Either way, the commitment was treated as binding on the SEC, provided that the facts were as stated in the request.

Although no-action letters provided justifications for the staff's ultimate conclusions, they were not considered precedents. Until 1970, in fact, the SEC did not even make them publicly available.(213) As a result, the staff's "policy" (such as it was) was accessible only to SEC specialists in the bar, some of whom privately compiled and exchanged letters obtained for their clients.(214) After 1970, the compilation and distribution (as well as indexing and digesting) functions have been performed by private services. The SEC staff did prepare internal summaries of "significant" no-action decisions, but these research aids were reportedly not "heavily utilized" by staff.(215)

The low internal use of precedents probably reflected both the routine nature of most requests and the open-textured and fact-specific nature of the SEC's substantive policy. According to a 1969 SEC staff study (the "Wheat Report"), the staff used a "subjective" test to determine whether the purchaser had taken the

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212. For descriptions of the no-action process, see Lockhart, SEC No-Action Letters: Informal Advice As a Discretionary Administrative Clearance, Law & Contemp. Probs. 95 (1973), and Lowenfels, SEC No-Action Letters: Some Problems and Suggested Approaches, 71 Colum. L. Rev. 1256 (1971).

213. SEC Securities Act Rel. No. 5098, October 29, 1970, CCH Fed. Securities L. Rep. ¶ 77921.

214. Lockhart, supra note 212, at 106.

215. Id. at 115-16.

securities "with a view to distribution."(216) While the length of the holding period was considered probative of original intent, the Commission emitted rather confused signals about the length of time necessary to demonstrate "investment intent" (the opposite of "distribution intent"). One Commissioner publicly suggested a two year period,(217) while staff sometimes said five years, sometimes three.(218) Whatever the holding period necessary to cleanse a transaction, an investor who alleged a sufficiently compelling "change of circumstances" could obtain permission to sell a security held for a shorter period.(219) One could say with some assurance that a "change of circumstance" relating solely to the investment itself (such as one causing a decline in its market value) would not qualify. But, what sort of personal circumstances might move the staff was more difficult to predict.

Pressure to clarify the SEC's policy mounted in the late 1960s and early 1970s. Private practitioners and commentators deplored the lack of "certainty" in the Commission's policy, the apparent conflict between the staff's and commission's interpretations, and the resulting "unpredictable environment for investors."(220) The Wheat Report echoed many of these same criticisms and offered a series of proposed rules (the "160 series") to clarify its policy.(221) After receiving extensive public comment and

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216. SEC, Disclosure to Investors -- A Reappraisal of Federal Administrative Policies Under the '33 and '34 Acts, at 163 (1969)(reprinted as CCH Fed. Securities L. Rep. No. 5213) [hereinafter cited as Wheat Report, so named because conducted by SEC staff under the direction of former Commissioner Francis M. Wheat].

217. See id. at 165.

218. See Levenson, Rule 144 and Other Current SEC Developments, in PLI Second Annual Institute on Securities Regulation 60, 69-70 (R. Mundheim & A. Fleischer, Jr., eds. 1971).

219. Wheat Report, supra note 216, at 166-70.

220. See Leiman, Registration Provisions in Venture Capital and Similar Financing Agreements, in R. Mundheim & A. Fleisher, Jr., supra note 218, at 101.

221. Wheat Report, supra note 216, at 174-77.

conducting further internal analysis, the SEC abandoned the approach embodied in the 160 series, and instead adopted Rule 144.(222)

Rule 144 utilized the so-called "safe harbor" technique: transactions that met all of its conditions were "deemed" to be exempt from the Act's registration requirement (and therefore immunized from civil or criminal liability). Transactions not fully satisfying the rule might also qualify for exemption, said the Commission, but the burden of proof on the proponent of exemption would be "substantial."(223) Even this small window was effectively closed by a simultaneous announcement that the SEC staff would no longer issue no-action advice concerning resale of restricted securities acquired after the Rule's effective date.(224)

Anchorage in Rule 144's "safe harbor," as originally dredged, required satisfaction of five conditions:

1. availability of "adequate current public information with respect to the issuer;"
2. a minimum holding period between purchase and proposed sale;
3. a quantity limitation on the amount sold;
4. sale in a "brokers' transaction;" and
5. notification of the sale to the SEC.

The Rule expressed each of the five conditions in highly objective terms. For example, the holding-period condition required that the seller have owned the security for a period of two years prior to the resale and contained elaborate conditions for establishing the acquisition date for securities acquired by promissory note, option, stock dividend, conversion, gift, bequest, or other

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222. Securities Act, Rel. No. 5223, 37 Fed. Reg. 596 (1972), codified as amended at 17 C.F.R. § 230.144 (1981).

223. 37 Fed. Reg. 596 (1972).

224. Id.

means.(225) The volume limitation provision specified a formula (based on the percentage of outstanding shares in the class of securities involved or the average weekly volume of such securities traded on an exchange) for calculating a ceiling on the amount of securities a person may sell in exempt transactions within a six-month period.(226)

In the ten years since its issuance, Rule 144 has undergone repeated amendment. The SEC has substantively amended the rule nine times.(227) With the exception of two amendments designed simply to harmonize Rule 144 with other SEC rules,(228) this series of amendments has produced a steady relaxation of the original restrictions, at least as applied to sales by "nonaffiliates" (persons not in a control relationship with the issuer).(229) Nonaffiliates who have held securities for a specified holding perod (now three years) have gradually been excused from compliance with other conditions (volume limits, manner-of-sale, and notice). This development suggests a gradual movement toward a simple holding period test, although at the present time the rule is a highly complex amalgam of the original conditions overlaid with newer exemptions.(230)

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225. 17 C.F.R. § 230.144(d), as inserted by 37 Fed. Reg. 596 (1972).

226. 17 C.F.R. § 230.144(e), as inserted by 37 Fed. Reg. 596 (1972).

227. See 37 Fed. Reg. 20577 (1972); 39 Fed. Reg. 6069 (1974); 40 Fed. Reg. 6487, 44541 (1975); 41 Fed. Reg. 24701 (1976); 43 Fed. Reg. 43709 (1978); 44 Fed. Reg. 15610 (1979); 45 Fed. Reg. 6362 (1980); 46 Fed. Reg. 12195 (1981).

228. 40 Fed. Reg. 6487 (1975); 45 Fed. Reg. 6362 (1980).

229. See especially 44 Fed. Reg. 15610 (1979) (removing volume limitations on most sales by nonaffiliates after a holding period of 3 or 4 years, depending on type of security), and 46 Fed. Reg. 12195 (1981) (expanding class of securities exempt from volume limitations; setting uniform 3-year holding period for such securities; removing manner-of-sale restrictions on resale of such securities).

230. The newer exemptions have been codified as a new subsection (k) of the Rule. For the current revision of the Rule, see 17 C.F.R. § 230.144 (1981).

The SEC's official explanation for adopting Rule 144 in 1972 featured both substantive and formal arguments. The Rule renounced the old "change of circumstances" test in favor of an approach more directly linked to the goal of assuring adequate protection of unsophisticated purchasers. "[T]he circumstances of the seller," explained the Commission, "are unrelated to the need of investors for the protections afforded by the registration and other provisions of the Act."(231) But Rule 144 sought to change more than the focus of Commission policy. It sought to achieve greater "certainty" as well.(232) It was a deliberate exercise in precision enhancement, and it is the success of that exercise in which we are principally interested.

Contemporaneous justifications for Rule 144 invoke arguments falling under three headings of our "precision calculus" -- enforcement transaction costs, quality control costs, and compliance costs. The Wheat Report cited the "growing burden" of responding to no-action requests involving resales as a major justification for adopting bright-line rules.(233) The study estimated that its proposed series 160 rules would dispose of approximately 90 percent of the issues raised in the 500 no-action requests answered during the final two months of 1968.(234) A later study by William Lockhart sponsored by the Administrative Conference of the United States estimated that 80 percent of the Division's 5000 annual no-action replies concerned resale of unregistered securities. (235)

How onerous was this "burden"? A caseload of 3000 or 4000 seems impressive. But the no-action process was extremely informal and efficient, involving essentially only an exchange of correspondence. Internal legal research was very limited, dialogue between the agency and the applicant rare, and internal review perfunctory. Over half of the requests were answered in a month, and over 80 percent within two months.(236) Lockhart

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231. 37 Fed. Reg. 596 (1972).

232. Id. (citing "uncertainty in the application of the registration provisions of the Act").

233. Wheat Report, supra note 216, at 175.

234. Id.

235. Lockhart, supra note 212, at 96.

236. Id. at 111.

estimated that the total staff resources devoted to no-acton letters in the Division amounted to only 7.6 person-years.(237)

A proper accounting of the social cost of the SEC's pre-Rule 144 policy, however, must also include the resources expended by potential resellers (or their brokers) to obtain private legal advice on the transaction's exempt status. Although this cost does not figure in official SEC justifications for Rule 144 and we lack direct evidence of its magnitude, it undoubtedly exceeded SEC staff costs by a wide margin.(238) Indeed, the SEC had itself contributed to the growth of this expense by its 1970 decision to make all no-action letters publicly available.(239) The ready availability of no-action advice, on the other hand, presumably set a moderate ceiling on the amount most investors would invest in pretransactional legal advice.

Issuance of Rule 144 has unquestionably reduced the flow of inquiries to the SEC and, consequently, the staff resources required to answer them. The preface to Rule 144 announced that the SEC would no longer render no-action advice on transactions governed by the Rule. Although the Division of Corporation Finance still entertains informal requests for "interpretive" advice, its Deputy Director estimates the volume of these requests

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237. Id. at 109.

238. The magnitude of the investment in private legal advice undoubtedly reflects the size of the seller's financial risk. The principal legal risk incurred by the reseller of unregistered securities is liability to the purchaser. Section 12 of the Act gives the purchaser an absolute right to rescind a sale in violation of the registration requirement without the need to prove scienter or reliance. See 15 U.S.C. § 771 (1980). This effectively makes the seller a guarantor against decline in the securities' value. The risk undertaken by a reseller, then, is a function of the sale price, the probability of a future decline in the securities' market value, and the probability that the resale will be judicially determined not to be exempt under Section 4. The larger the first two quantities, the more the reseller should be willing to invest in pretransactional legal advice to estimate or reduce the third quantity. Undoubtedly, this calculus would often justify substantial investments in legal advice.

239. See note 213 supra.

at less than ten percent of the previous inquiry volume.(240) Since Rule 144 is far more accessible and compact than the previous sprawling body of no-action letters, moreover, the cost of obtaining private legal advice must also have fallen markedly. These savings in rule-application transaction costs have been eroded, to be sure, by an increase in rulemaking costs. The Commission has revised Rule 144 repeatedly during its brief life and has also issued two extensive "interpretive releases."(241) But it seems safe to conclude that the overall impact of Rule 144 on transaction costs has been favorable.

Another concern articulated by the Wheat Report -- the "constant problem in providing reasonably consistent advice"(242) -- evokes internal quality control costs. Even apart from the substantive distortions in the old policy, its sheer vagueness led to misapplications, the Report suggested. As applied to SEC staff interpretations, the problem of inconsistency seems relatively insignificant. The SEC's clearance function was highly centralized.(243) Requests for no-action letters were handled by some 40 lawyers in the Division, organized in branches defined by class of corporate activity. Drafts of all responsive letters were, in turn reviewed by one of two Assistant Chief Counsels in the Division's Office of Chief Counsel and submitted to the Chief Counsel for signature. As the Wheat Report acknowledges, the difficulty of controlling consistency in so centralized a process is not particularly formidable. A more serious problem, the Report claimed, was erroneous application of policy by private counsel. Undoubtedly, many errors (both excessively restrictive and excessively liberal interpretations) did in fact occur. But the ready availability of inexpensive official advice and the sophistication of the regulated population could be counted upon to hold the number and magnitude of such errors in check.

The compliance-encouraging justification for the Rule offered by the SEC also seems overstated. The Wheat Report invokes a compliance concern when it complains that the Commission's "vague and imprecise" policies encouraged "unprincipled counsel" to endorse improper transactions. "The pressures are strong," says

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240. Letter from John J. Huber, Deputy Director, SEC Division of Corporation Finance, to Jeffrey S. Lubbers, Acting Research Director, ACUS, Aug. 24, 1982.

241. SEC Interp. Rel. No. 5306, 37 Fed. Reg. 23180 (1972); SEC Interp. Rel. No. 6099 (August 2, 1979).

242. Wheat Report, _supra_ note 216, at 176.

243. _See_ Lockhart, _supra_ note 212, at 108-11.

the Report, "and the temptation to cut the statutory corner is magnified by uncertainty."(244) But that same pressure was also constrained by some rather powerful counterforces, such as the exposure to section 12(1) liability and criminal and injunctive sanctions. A major public sale of unregistered securities leaves a rather clear trail for subsequent investigators. It usually involves "repeat players"(245) (securities lawyers, brokers, large-volume purchasers) who have a substantial reputational interest to protect. In the face of these realities, the Wheat Report's undocumented assertion is not particularly persuasive.

The transaction cost gains attributable to Rule 144's adoption must be balanced against any congruity problems occasioned by its application. While the preamble professed monolithic concern for protecting innocent purchasers, the SEC clearly recognizes a competing obligation to encourage capital formation. Indeed Rule 144's principal author, Alan Levenson, attributed the abandonment of the proposed "160 Series" rules to a fear of discouraging "venture capital" investments in new enterprise.(246) Yet, the history of Rule 144 suggests that its original restrictive conditions had that same effect. Fear of underinclusiveness drove the agency to the opposite excess and, in the process, to an extreme degree of complexity that probably diluted the Rule's intended transactional gains.

In its recent amendments to the Rule, however, the SEC appears to be moving toward a better balance of precision and complexity. The standard for sale of restricted securities by nonaffiliates is evolving toward a simple holding-period test plus requirement of public information. This simplified test promises to reduce overinclusiveness losses to manageable proportions, while greatly simplifying the task of interpreting and applying the Rule. Thus, while the original Rule 144 was itself a dubiously successful step in the quest for certainty, it has triggered an ongoing evolution that has brought the SEC closer to its goal.

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244. Wheat Report, supra note 216, at 177.

245. See Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc'y Rev. 95 (1974).

246. Levenson, supra note 218, at 65.

F. Parole Release Guidelines

The American institution of parole dates back to 1875, when New York's Elmira Reformatory began experimenting with a release program patterned after the British "ticket of leave."(247) The use of parole release as an instrument of federal corrections policy began in 1910, with the creation of the United States Board of Parole.(248) The rapid growth of parole after the turn of the century reflects a shift in American correctional philosophy from purely punitive to rehabilitative goals. Progressive reformers viewed parole release as an act of mercy granted by the state to relieve the harshness of mechanical judicial sentences. Its growth paralleled the expanded use of indeterminate sentences. Together, these two discretionary instruments theoretically permitted the state to adjust the period of incarceration to fit the rehabilitative progress of the prisoner.(249)

Growing doubts about the wisdom and efficacy of the rehabilitative ideal brought the parole system (along with many other aspects of correctional policy) under increasing attack over the next half century. Some critics focused on the desirability of the rehabilitative goal, while others doubted its administrability. But, whatever their philosophy, most came to view the parole system as an exercise of essentially unrestrained official discretion parading behind a facade of individualized justice.(250) The United States Board of Parole, as the most visible parole agency, was a lightning rod for much of this criticism. Its response, in turn, represents an illuminating case study in the political economy of rule precision.

The federal parole release process in the late 1960s was very close to a pure example of official discretion. The system was then administered by the United States Board of Parole, a tiny agency located within the Justice Department, and consisting of eight members appointed by the President with Senatorial

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247. Gurfein, The Federal Courts Look at Parole, 50 St. John's L. Rev. 223, 223 (1975).

248. Act of June 25, 1910, ch. 287, §2, 36 Stat. 819.

249. G. Giardini, The Parole Process 18-19 (1959).

250. See, e.g., K. Davis, Discretionary Justice 126-33 (1969); Kasenmeier & Eglit, Parole Release Decision-Making Rehabilitation, Expertise and the Demise of Mythology, 22 Am. U.L. Rev. 477 (1973).

confirmation.(251) Board members served overlapping six-year terms. The parole decisionmaking procedure was highly informal.(252) Once a federal prisoner became eligible for parole under the terms of his sentence,(253) he could request the Board to release him. Upon receipt of the request, the Board would schedule a "hearing" at the prison. The "hearing" was in reality a brief interview with the prisoner (averaging about ten to fifteen minutes), at which he might be asked a few questions about his record and given a chance to make any personal statement he might wish.(254) At one time, hearings were conducted solely by Board members. Later the Board hired eight "hearing examiners" to conduct about two-thirds of its hearings.(255) The hearing examiner would prepare a summary of the hearing, which would be referred to two members of the Board. If they agreed on the disposition (not to release or to release and, if the latter, on what conditions), the matter ended there. If they disagreed, a third member was brought in to break the tie. Occasionally, a case might be referred to the full Board.(256) The Board gave no reasons to disappointed applicants for denying their request for parole release.

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251. See 18 U.S.C. §4201 (repealed in 1976). It is now administered by the United States Parole Commission, consisting of nine members appointed by the President with the advice and consent of the Senate. See Parole Commission and Reorganization Act of 1976, 90 Stat. 219, 18 U.S.C. §4201 (1980). Since this study focuses primarily on the decision to adopt the original guidelines in 1973, the term "Board" is most often used to refer to the agency.

252. See Johnson, Federal Parole Proceedings, 25 Ad. L. Rev. 459, 461-61, 467-71 (1973); Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 820-21 (1975) [hereinafter cited as Yale Project].

253. For most adult offenders, after serving one-third of the full sentence. See Yale Project, supra note 252, at 818-19.

254. Johnson, supra note 252, at 468.

255. Id.

256. Id. at 471-72.

Written standards for parole release decisions provided virtually no additional guidance. The statutory standard then in force provided simply:

> If it appears to the Board of Parole...that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.(257)

The Board's published rules elaborated on this sparse statutory language only slightly, by listing "factors...considered by the Board in its decision making."(258) The list contains 33 items grouped under nine headings. A representative sample is the six items under "F. Personal and Social History":(259)

(1) Family and marital

(2) Intelligence and education

(3) Employment and military experience

(4) Leisure time

(5) Religion

(6) Physical and emotional health.

One would have to search diligently to find a collection of regulatory words that conveys so little meaning about the decisional rule, if any, being applied.

In 1971, Board's staff began to work on developing a set of more articulate guidelines for parole release. Its effort

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257. 18 U.S.C. §4023(a) (repealed in 1976).

258. Rules of the U.S. Board of Parole, Effective January 1, 1971, at 14.

259. Id. at 15.

coalesced around the establishment of two indices, one designed to measure the severity of the inmate's offense, the other designed to measure the probability of recidivist behavior. The staffutilized different approaches to construct the two indices. The "offense severity" index relied solely on the subjective judgment of the eight Board members.(260) The staff prepared brief descriptions of 65 criminal behaviors which the Board members and hearing examiners individually ranked into seven categories of relative severity. The staff then repeated the exercise with 51 offenses and six severity categories. After computing mean ratings and making some adjustments based on group discussion, the Board adopted a scale grouping most common offenses into six severity categories (ranging from "Low" to "Greatest").

The Board conducted a statistical analysis of post-release behavior to formulate the predictive index.(261) Using three samples drawn from the population of prisoners released during the first six months of 1970, the staff attempted to determine those attributes most highly correlated with parole "success" or "failure". Parole success was defined as the absence (during the two year period following release) of: 1) a conviction resulting in a sentence of 60 days or more, 2) a return to prison for a technical parole violation, or 3) an outstanding absconder warrant. After crosstabulating 66 offender characteristics (called "salient factors") with the dependent variable (success or failure), the staff selected nine salient factors that had the greatest predictive value: number of prior convictions, number of prior commitments, age at offense leading to first commitment, whether a commitment offense involved automobile theft, prior parole revocation or failure, history of drug dependence, employment history, and marital status.(262) The first two

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260. The process is described in greater detail in Hoffman, Beck & De Gostin, The Practical Application of a Severity Scale in Parole: Legal Issues, Decision-Making, Research 169 (W. Amos & C. Newman, eds. 1975).

261. For a description of the process, see Hoffman & Beck, Parole Decision-Making: A Salient Factor Score, 2 J. Crim. Justice 195 (1974).

262. The Board and Commission have gradually reduced the list to six. See 28 C.F.R. § 2.20 (Salient Factor Score)(1982). In the process, they have eliminated the "status" variables like education and employment, in favor of exclusively behavioral variables, but with no loss of predictive power.

salient factors listed above were measured by a trinary scoringsystem. For example, a prisoner would receive a "prior convictions" score of "2" if he had had no prior convictions, "1" if he had had one or two prior convictions, and "0" for three or more prior convictions. The Board used a binary scoring system ("0" or "1") to measure the other seven factors. To compute an inmate's total "salient factor score," then, one had simply to sum his scores on the nine items. For purposes of administrative convenience, the staff then collapsed the range of 12 possible total scores (0 to 11) into four categories: "poor" (0-3), "fair (4-5), "good" (6-8), and "very good" (9-11). As the statistical results indicated, the percentage of parolees with successful outcomes increased as one moved up the scale.(263)

The final step was to combine the two scales into a six-by-four matrix specifying the detention period appropriate for each combination of offense severity and offender characteristics.(264) Here, the Board consciously decided to adhere as closely as possible to its prior practice. For each cell in the matrix, the researchers established a range of detention periods within which most of the Board's past decisions had actually fallen. After smoothing and adjusting the ranges to reflect the Board's views, the staff produced a set of "guidelines" showing a range of detention periods (in months) appropriate for each combination. For example, the guideline period specified for persons sentenced for a "moderately" severe offense (such as bribing a public official or unauthorized possession of a machine gun), who were considered "very good" risks, was 12 to 16 months. The detention period for a "poor" risk convicted for the same offense, on the other hand, was 24 to 30 months.

In an effort to test their workability, the Board experimented with the proposed guidelines in one of its five regional offices, beginning in October 1972.(265) The project proved sufficiently

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263. For example, in the "construction" sample, the "success" rate (percentage of parolees with successful parole outcomes) rose from 50 percent for the "poor" risks, to 61 percent for the "fair" risks, to 77 percent for the "good" risks, to 93 percent for "very good" risks. Hoffman & Beck, supra note 261, at 202.

264. This step is described in Gottfredson, Hoffman, Sigler & Wilkins, Making Paroling Policy Explicit, Crime & Delinquency (1975).

265. Yale Project, supra note 252, at 822, n. 58.

successful to induce the Board to adopt the Guidelines on a nationwide basis in September 1973.(266) Although they have undergone repeated modification and elaboration, the Guidelines have been in continuous use since then.(267) After surviving early attacks in various courts,(268) the guidelines received strong implicit Congressional endorsement in the Parole Commission and Reorganization Act of 1976.(269) In addition to a number of structural and procedural reforms, including replacement of the Board with a nine-member "Parole Commission," the Act directed the agency to "promulgate rules and regulations establishing guidelines" for parole release.(270) The clear intent of this provision was to ratify the Board's general approach, if not its specific rules.

As originally adopted (and still today), the guidelines left considerable room to individualize parole release decisions. Expressing the appropriate detention period as a range, rather than as a fixed value, preserved an important degree of discretion. The outer bounds of those ranges, moreover, are "merely guidelines" that may themselves be varied "when circumstance warrant."(271) The power to individualize by deviating from the guidelines remains largely unfettered by postivistic constraints. To keep the rate of variance under control, the Board chose to rely, instead, on a procedural device of requiring decisionmakers to justify deviations.(272)

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266. 38 Fed. Reg. 31942 (1973).

267. For the current version, see 28 C.F.R. §2.20 (1981).

268. E.g., Billiteri v. United States Bd. of Parole, 541 F.2d 938 (2d. Cir. 1976); Battle v. Norton, 365 F.Supp. 925 (D. Conn. 1973); Wiley v. United States Bd. of Parole, 380 F.Supp. 1194 (M.D. Pa. 1974); DeVyver v. Warden, 388 F.Supp. 1213 (M.D. Pa. 1974).

269. Pub. L. 94-233, 90 Stat. 219.

270. 18 U.S.C. §4203(a)(1)(1980).

271. 28 C.F.R. §§2.20(c)(1981).

272. 28 C.F.R. §2.13(d) (1981). The percentage of cases decided within the guideline limits, was over 90 in early years, Yale Project, supra note 6, at 869, n. 293, but has fallen to around 80 more recently. Hoffman & Stover, Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function, 7 Hofstra L. Rev. 89, 108 (1979).

A good deal of discretion is also inherent in the offense severity scale. Although the scale has undergone considerable elaboration, it still relies on very abbreviated offense descriptions(273) and, for multiple offenses or unclassified offenses, commits the classification decision to the decisionmaker's judgment.(274) The "salient factor score," by contrast, utilizes relatively objective measures such as number of "prior convictions" or "age at commencement of the current offense."(275) But it does preserve a little room for judgment, as, for example, in the criterion "history of heroin or opiate dependence."(276)

However extensive the open texture in the guidelines, their adoption in 1973 represented a quantum leap in the precision of the Board's policy. Development of the parole guidelines was an exercise in policy clarification as pure as one is likely to encounter outside the laboratory. The Board's motivation was not to adopt a new or substantially revised policy, but to codify an existing, albeit inchoate, policy.(277) The result has been widely applauded as a welcome advance in the fairness of parole decisionmaking.(278) Superficially, at least, the Board's action does indeed seem to warrant commendation. Yet here, as always, greater precision is achieved at a price. And a careful assessment of the guidelines' costs reveal the heavy justificatory burden its asserted benefits must bear.

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273. See 28 C.F.R. §2.20 (Offense Characteristics) (1981). For a criticism of some of the Board's offense categories, see Alschuler, Sentencing Reform and Parole Release Guidelines, 51 U. Colo. L. Rev. 237, 244-45 (1980).

274. 28 C.F.R. §2.20 (General Notes, B-E (1981).

275. 28 C.F.R. §2.20 (Salient Factor Score, Items A & C) (1981).

276. Id., Item F.

277. Interview with Peter Hoffman, Research Director, U.S. Parole Comm'n., Washington, D.C., December 9, 1980.

278. See e.g., Alschuler, supra note 272; Gottfredson, Parole Guidelines and the Reduction of Sentencing Disparity: A Preliminary Study, 16 J. Research in Crime & Delinquency 218 (1979); Yale Project, supra note 252.

The guidelines have almost certainly increased rulemaking and enforcement costs. Their initial development was expensive. The bulk of the research necessary to establish the salient factor score was funded by a grant from the Law Enforcement Assistance Administration.(279) Developing the offense severity scale, computing the detention periods, and securing agreement among the eight members of the Board consumed large quantities of staff and Board time.

Maintenance and application of the guidelines, moreover, impose ongoing rulemaking costs. Roughly a quarter of the agency's $200,000 annual research budget is devoted to this function.(280) The Board systematically reviewed the guidelines periodically--in the first few years, at six-month intervals; now, on an irregular basis.(281) These periodic reviews have spawned frequent amendments. Another component of ongoing rulemaking costs is the requirement that decisionmakers provide special written justification for deviating from the suggested detention periods in the ten to twenty percent of cases where that occurs.

This heavy initial and continuing investment in rulemaking did not replace any significant ongoing rulemaking costs implicit in the pre-guidelines regime. Board members did undoubtedly discuss policy issues from time to time. But, since the panels did not customarily give a reason for their decisions, the resources expended on developing a "common law" of parole release were negligible. It is true that, contemporaneously with issuing the guidelines, the Board began furnishing a statement of reasons to disappointed applicants.(282) But that procedural reform was apparently as much an effect as a cause of the guidelines' promulgation.

Neither did the guidelines reduce rule-application transaction costs. It is true that the Board had a substantial caseload, considering its limited resources. In 1970, for example, it conducted 11,784 hearings, most of them involving parole

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279. Hoffman interview, supra note 276. The Board received a grant of $600,000, of which roughly two-thirds was devoted to guidelines development.

280. Hoffman interview, supra note 276.

281. Hoffman & De Gostin, Parole Decision-Making: Structuring Discretion, Federal Probation, December 1974, at 9-10.

282. See Hoffman & DeGostin, supra note 279.

applications.(283) While this number had declined in the late 1960's, it began to rise slightly in the early 1970's.(284) Since the Board denied about half of its parole applications,(285) one might imagine that clearer eligibility rules could greatly reduce its caseload by discouraging futile petitions. But, this consideration played little part in the decision to adopt guidelines.(286) This is not surprising. Almost all prisoners apply for parole once they become eligible and would probably be expected to do so under almost any regulatory regime. The cost to them of applying, after all, is almost zero. Since the reward from successful application in enhanced liberty is quite large, almost any perceived probability of success would justify making the effort. And, in fact, the number of Parole Board hearings has not declined appreciably since the guidelines were adopted.(287)

A second enforcement-cost hypothesis for adopting the guidelines--reducing the average cost per decision--must also be rejected. Cost per decision was already about as low as one could reasonably imagine: hearings averaged only ten to fifteen minutes. The very opacity of the Board's policy gave the adversarially disadvantaged applicant very little to focus on. If anything, the average length of hearings has increased since adoption of the guidelines,(288) although this may be fully attributable to the procedural reforms instituted simultaneously

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283. Johnson, supra note 252, at 304.

284. [1970-1972] U.S. Bd. of Parole, Biennial Rep. 20 (11,848 in 1971; 12,694 in 1972).

285. Id. at 22 (53 percent denial rate in 1971, 50 percent in 1972).

286. Hoffman interview, supra note 276.

287. [1976-1978] U.S. Parole Comm'n. Rep. 15 (12,056 in 1975, 11,919 in 1978).

288. Johnson reported that each hearing examiner scheduled up to 20 hearings per day in 1971. Johnson, supra note 252 at 468. The Yale Project reported an average 15 per day in 1974. Yale Project, supra note 252, at 832, n. 103. Hoffman reported an average of 10 to 12 per day in 1980. Hoffman interview, supra note 276.

with the guidelines' adoption.(289)

Even if the guidelines did not reduce the cost of parole decisionmaking, one would surely expectthem to enhance its quality (by reducing the number of erroneous or inconsistent decisions, or by reducing the internal costs of maintaining a given level of quality). While the positive value of this variable seems assured, its magnitude is much more problematic. Direct measures of pre-guidelines decisional quality are nonexistent, and indirect measures scarce. One plausible indirect measure is the rate of disagreement among members of decisionmaking panels in parole release cases. A high rate of disagreement, by implying a high rate of inconsistency, suggests a large error rate. Given the extreme centralization of pre-guidelines parole decisionmaking, one would not expect a high rate of disagreement. It is true that the Board had recently devolved the conduct of most hearings to eight hearing examiners, but the actual parole release decisions were still made by the eight Board members, sitting in panels of two. Not only did the shifting composition of the panels assure constant interaction among Board members, but *de facto* specialization compressed even further the effective size of the decisionmaking body.(290)

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289. These procedural reforms, including a right to be accompanied by a representative, a written statement of reasons for denial, are described in DeGostin & Hoffman, Administrative Review of Parole Decisions, Federal Probation, June, 1974.290. Five Board members specialized in adult cases and three in juvenile cases. Johnson, *supra* note 252, at 462.

290. Five Board members specialized in adult cases and three in juvenile cases. Johnson, *supra* note 252, at 462.

Direct evidence of internal consistency supports this prediction. In constructing the offense severity scale, Board staff found a "quite high" rate of agreement among Board members on the ratings assigned to offense categories.(291) The "high correlations" revealed by a later statistical analysis of the Board's 1971 youth parole decisions suggested a "fairly consistent (although implicit) youth parole selection policy."(292) Another study found "split votes" (disagreeaments among panel members) in only 17 percent of 1212 randomly selected adult parole decisions during 1971 and 1972.(293)

However modest the absolute magnitude of the Board's quality-control problem, the evidence suggests that the guidelines did effect a significant relative improvement. Two recent studies comparing the length of judicial sentences with time actually served indicate that Parole Board decisions have reducedsentencing disparities to a markedly greater extent after the guidelines' promulgation than before.(294) In another study of parole

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291. Hoffman, Beck & DeGostin, supra note 260, at 179. The rate of agreement among hearing examiners was even higher. Id. at 172.

292. Hoffman, A Paroling Feedback Method, in W. Amos & C. Newman, eds., supra note 260, at 343, 351.

293. Hoffman, Gottfredson, Wilkins & Pasela, The Operational Use of an Experience Table, Criminology, August 1974, at 214, 225. Johnson, supra note 252, at 462, reported an "informal estimate" by the Board of split decisions in 30 percent of cases. The methodology yielding the 17 percent figure seems more reliable, though the difference may reflect sampling differences.

294. Compare Gottfredson, Parole Board Decision Making: A Study of Disparity Reduction and the Impact of Institutional Behavior, 70 J. Crim. L. & Criminology 77, 82 (1979) (sample of 1970-1972 parole decisions: 13 percent overall sentencing disparity reduction attributable to parole decisions), with Gottfredson, supra note 277, at 225 (sample of 1977 and 1978 decisions: disparity reduction of 26 to 46 percent, depending on offense and salient factor categories). Since the studies used a definition of "disparity" corresponding to the guidelines' classifications, the results may merely reflect a spurious "guidelines effect" rather than a real "disparity" reduction. See Gottfredson, supra note 277, at 227.

hearings conducted shortly after the guidelines' promulgation, observers found split decisions in only three of the 109 hearings observed.(295) While suggestive only, these data attest to the efficacy of the guidelines as a consistency-promoting mechanism.

One is left, in assessing the consequences of parole guideline development, with their impact on primary behavior. One conceivable justification for parole guidelines is their potential for motivating socially beneficial conduct during incarceration. By conditioning parole eligibility on the performance of (or more likely the avoidance of) certain well-defined acts or the attainment of certain well-defined personal skills, guidelines could substantially reinforce the rehabilitative and order-preserving objectives of prison regimen. But that was not, in fact, a principal function of the guidelines. By the early 1970s, the Board had concluded that the presumed relationship between participation in prison programs and rehabilitation had not been scientifically demonstrated.(296) Consequently, in fashioning its detention policy, the Board focused primarily on the deterrent and incapacitative goals of incarceration. Consequently, the two indices that determine presumptive release dates are based solely on preadmission behavior or conditions. They have nothing whatever to do with conduct or attainments while in custody. The only nod to in-prison behavioral considerations in the original rules was the proviso: "These guidelines are

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295. Yale Project, supra note 252, at 832, n. 102. The probative value of this datum is diminished by doubts concerning the sample size and composition. The sample included only 69 initial parole decisions and 30 decisions on review. Id. at 829, n. 95. There is no indication that the sample was selected at random. Direct comparison with the earlier 17 percent figure is hampered, moreover, by intervening procedural changes -- particularly the fact that, after 1973, panel members discussed the case between them before rendering the decision.

296. Yale Project, supra note 252, at 826, 828, 848, 886. For support from the social sciences, see e.g., D. Lipton, R. Martinson & J. Wilks, The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies (1975); G. Kassenbaum, D. Ward & D. Wilner, Prison Treatment and Parole Survival (1971).

predicated upon good institutional conduct and program performance."(297)

A second possible behavioral justification for parole guidelines is their impact on primary criminal behavior. That is, by giving potential criminals indication of the actual detention periods associated with particular conduct, guidelines might promote the general deterrence goals of the criminal justice system. This rationale assumes that sentencing judges will rarely defeat the guidelines' operation by setting especially high minimum or low maximum sentences. Such judicial behavior would obviously undermine any possible gain in predictability afforded by the rules. In fact, however, it appears that this is not a serious problem. Judicial sentences rarely conflict with the guidelines, partly because the rules themselves reflect pre-existing judicial patterns and partly because judgesincreasingly take the guidelines into account in making current sentencing decisions.(298)

A more serious objection to the "general deterrence" justification is the cognitive assumptions on which it rests. It seems highly unlikely that many potential criminals are aware of the guidelines'existence, much less their contents. Nor can one assume that expanded knowledge of the guidelines, even if achievable, would materially change primary behavior. Criminologists increasingly question the rational-man model of deterrence on which this entire argument is premised.(299) Many doubt that severity of punishment has any significant deterrent effect on most crimes against persons or property. Rational calculation probably does occur in some contexts -- such as organized and white collar crime. But the incremental deterrence afforded by translating an opaque parole policy based on offense severity and parole prognosis into a more explicit formula is probably slight, especially in view of the fact that the Parole Board cannot control or anticipate the other major component of the rational deterrence calculus -- probability of conviction.

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297. Note 5 to §2.52, as promulgated in 38 Fed. Reg. 31942, 31943 (1973). The current rules do, however, have more explicit provisions specifying increments to the presumptive release date for rule infractions and reductions for "superior program achievement." 28 C.F.R. §§ 2.36, 2.60 (1981).

298. Yale Project, supra note 252, at 882, n. 360.

299. See e.g., Bankeston & Cramer, Toward A Macro-Sociological Interpretation of General Deterrence, 12 Criminology 251 (1974); Geerken & Gove, Deterrence: Some Theoretical Considerations, 9 L & Soc'y Rev. 497 (1978).

Even if the guidelines have little or no impact on pre-conviction or in-prison conduct, they might be justified as more effectively serving the incapacitative goals of incarceration. That is, the guidelines might have increased the "congruence" between Board decisions and the objective of incapacitating harmful persons. The scientific methodology used by the Board to develop its salient factor score lends credence to this hypothesis, as do some studies purporting to show that the guidelines have reduced sentencing disparity.(300) But the plausibility of this hypothesis is very difficult to assess. We have very little evidence of the degree to which the Board's previous policies correctly related the period of detention to the risk of antisocial conduct.

Even the much more rigorous methodology used to develop the guidelines leaves many questions unanswered. The analysis used a definition of parole "failure" that only very crudely measures severity of antisocial conduct. The predictive index relies, moreover, on probabilistic distinctions that are not very sharp. For example, the probability of a favorable outcome in the Board's original sample falls from 77 percent for "good" risks to 61 percent for "fair" risks.(301) Some subsequent studies have found even smaller differentials.(302) Whether such modest risk differentials justify incarcerating "fair" risks 25 to 50 percent longer than "good" risks is at least debatable. The guidelines do permit deviation in individual cases, but that fact alone is no argument for favoring guidelines over the previous system of total ad hoc judgment. It is only to the extent that the guidelines channel individualized judgments into new (and preferable) patterns that they can be defended on this score.

Overall, then, the guidelines receive mixed ratings from our "precision calculus" -- a modest gain in decisional consistency, a modest loss in rulemaking and processing costs, and an uncertain impact on decisional congruence. This somewhat unsatisfying outcome may suggest flaws or incompleteness of analysis. For example, guidelines development has probably had a positive impact on the behavior of other audiences, such as prosecutors, judges, and even legislators by clarifying Parole Board policy and making

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300. See note 294 supra.

301. Hoffman & Beck, supra note 261, at 202.

302. Hoffman, Stone-Meierhoefer & Beck, Salient Factor Score and Release Behavior: Three Validation Samples, 2 L. & Human Behavior 47 (1978).

more visible previously submerged value conflicts in penology. It may also, by providing a better basis for reason-giving, have enhanced prisoners' subjective sense of satisfaction with the system. But, the real source of discomfort may lie deeper. The very methodology of this study -- its stubbornly utilitarian focus -- does not capture every value at work in administrative practice. Here, in particular -- in a regime that deals with individuals in their most vulnerable state, that makes judgments about their social acceptability or worthiness, and that has direct consequences for their personal liberty -- some deontological concept of fairness or justice clamors insistently for recognition. Whatever its precise contents, that concept seems to demand some degree of articulation greater than the Board's previous policy of official silence.

G. Penalty Standards for Hazardous Materials Transportation Act Violations

Federal regulation of hazardous material transportation has grown steadily since 1871, when Congress first authorized the Secretary of the Treasury to regulate transportation of certain explosives, flammables, and acids on passenger-carrying vessels in navigable waters of the United States.(303) The Secretary delegated his power to the Commandant of the United States Coast Guard (hereafter referred to as the USCG), then housed organizationally within Treasury. Over the next hundred years various acts have broadened the Coast Guard's regulatory powers.(304) Regulation of land transportation began with the Transportation of Explosives Act of 1908, which authorized the Interstate Commerce Commission to set standards for shipment of explosives by rail.(305) The Federal Aviation Act of 1958 gave the Federal Aviation Authority power to regulate hazardous material shipments by air.(306)

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303. 16 Stat. 441 (1871).

304. See 46 U.S.C. § 170 (1980).

305. 35 Stat. 554 (1908).

306. Pub. L. 85-726 (1958).

Only in the last 15 years, however, has transportation of dangerous substances received truly widespread attention. The Department of Transportation Act of 1967(307) grouped all regulatory functions under one departmental roof, but left legal authority split between the Secretary of Transportation (for water transportation) and the semi-autonomous administrators of the Federal Aviation, Highway, and Railroad Administrations (hereafter referred to as the FAA, FHWA, and FRA, respectively). In 1970, Congress strengthened the Secretary's powers,(308) but it was not until the passage of the Hazardous Materials Transportation Act of 1975 (hereinafter referred to as HMTA)(309) that the Secretary was given plenary authority over all four modes of shipment.

The Act authorized the Secretary to designate materials whose transportation in commerce "may pose an unreasonable risk to health and safety or property" as a "hazardous material"(310) and to promulgate regulations "for the safe transportation in commerce" of such materials.(311) The Act's chief enforcement provision authorizes the Secretary to impose, "after notice and an opportunity for a hearing," a civil money penalty of not more than $10,000 per violation on anyone who "knowingly commit(s) an act which is a violation" of the Act or a rule issued thereunder.(312) Each day of violation of a rule relating to shipper or carrier obligations constitutes a separate violation. The statutory standard for computing the appropriate penalty reads:

> In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of

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307. Pub. L. 89-670 (1967)

308. Hazardous Materials Transportation Control Act of 1970, Pub. L. 91-458 (1970).

309. Pub. L. 93-633, Title I, 88 Stat. 2156, codified at 49 U.S.C. §§ 1801-1812 (1980).

310. 49 U.S.C. § 1803 (1980).

311. 49 U.S.C. § 1804 (1980).

312. 49 U.S.C. § 1809 (1980).

> prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.(313)

Once administratively determined, a penalty may be recovered by civil action in a federal district court by the Attorney General. Prior to referring a case to the Attorney General, the Secretary may compromise the claim.(314)

Pursuant to the statutory authority to promulgate safety standards, the Secretary designated some 1800 substances as "hazardous materials,"(315) ranging in apparent danger from bombs and chlorine gas to oil paint and straw. The Secretary then proceeded to adopt some 1200 pages of rules specifying in exquisite detail how these various substances must be labeled, documented, handled, loaded, and stored.(316) Most of these rules were adopted wholesale, with little careful analysis, from bodies of pre-existing consensus standards issued by private standard-setting organizations.(317) As is the case in most contemporary health and safety regulation, these rules consist overwhelmingly of specifications standards rather than performance standards.

The Secretary delegated responsibility for enforcing these standards against carriers and shippers by air, highway, rail, and water to the four modal administrations (FAA, FHWA, FRA, and USCG, respectively). The Research and Special Programs Administration (RSPA), also responsible for writing the standards, received authority to enforce the container specifications against container manufacturers. In marked contrast to the excruciating detail of the substantive standards, this delegation of enforcement authority was accompanied by virtually no guidance on enforcement priorities or sanctioning policy.

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313. 49 U.S.C. § 1809(a)(1) (1980).

314. 49 U.S.C. § 1809(a)(2) (1980). This provision contains no independent criteria for the "compromise" of such a claim.

315. 49 C.F.R. § 172.101 (1981).

316. 49 C.F.R. Parts 171-79 (1981).

317. For a general description of this process, see Hamilton, The Role of Non-Governmental Standards in the Development of Mandatory Federal Standards Relating to Safety or Health, 56 Tex. L. Rev. 1329 (1978).

The enforcement process in each of the five units begins with an on-site inspection, either in response to an incident report or complaint, or as part of a random selection process. The majority of inspections fall into the latter category.(318) If the inspector detects an apparent violation, he may either try to resolve the problem on the spot or recommend formal enforcement action. Although the agency does not keep records of the number of violations detected, observers and participants estimate that the majority of violations are disposed of by simple verbal warnings or orders to correct. A smaller fraction results in written warnings or orders to correct, issued either by the inspector or by a superior. A smaller number still are referred, by way of the inspector's supervisors, to agency prosecutorial personnel with a recommendation to institute a formal compliance action.

In four of the five agencies (all but USCG) prosecution of HMTA violations is the responsibility of a small group of attorneys (from one to six) in that agency's Office of Chief Counsel. For almost all of these attorneys, HMTA enforcement is only one of several areas of responsibility. In the USCG, by contrast, the prosecutorial function is exercised by nonlawyer "hearing officers" in the several Coast Guard District Offices.

In practice, "formal enforcement action" almost invariably means assessment of a civil money penalty. The Act does provide for criminal penalties and injunctive relief, as well.(319) But use of these two sanctions requires referral to the Department of Justice for prosecution and trial, whereas DOT has self-contained authority to impose civil fines. It is therefore hardly surprising that the agency relies almost exclusively on that sanction.

What is perhaps more surprising is that virtually all of the civil penalty cases initiated by agency lawyers are resolved by compromise without the necessity of even the administrative hearing guaranteed by the Act. Agency lawyers, then, not only exercise the prosecutor's customary _de jure_ control over initiation of a legal action, but also exercise nearly complete _de facto_ control over its termination as well. Table I shows the volume, level, and dispersion of penalty assessments by the five enforcement units for the twelve-month period ending June 30, 1979.

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318. _See_ C. Diver, A Study of the Effectiveness and Fairness of DOT Hazardous Materials Enforcement Penalties, Final Report to the General Counsel, U.S. Dept. of Transportation, June 1980, at 30 [hereafter cited as HMTA Penalty Study] (80 percent of penalty assessments result from general survey inspections).

319. 49 U.S.C. § 1809(6) (1980).

TABLE I
PENALTY ASSESSMENTS, BY ENFORCEMENT UNIT
(cases closed with penalty assessment,
July 1, 1978-June 30, 1979(320))

	Enforcement Unit				
	FAA	FHWA	FRA	USCG	RSPA
Number of Cases	84	71	42	129	22
Number of Violations Cited	281	211	267	339	244
Initial Assessment per Case(321)					
Range ($)	19950	65800	77500	79550	27200
Median($)	2000	6000	8000	650	3500
Mean ($)	2693	8576	14964	7769	6528
Coeff. of Disp. (322)	1.19	1.04	1.20	1.85	1.55
Final Assessment per Case(323)					
Range ($)	7475	59900	66050	3950	8500
Median ($)	800	3000	4000	250	2000
Mean ($)	1532	4198	9834	453	2839
Coeff. of Disp.	1.09	1.76	1.34	1.25	.94
Initial Assessment per Violation					
Range ($)	9950	23833	9750	14975	5800
Median ($)	500	3000	3000	375	1000
Mean ($)	1028	3686	3549	2564	1415
Coeff. of Disp.	1.57	.95	.69	1.57	.98
Final Assessment per Violation					
Range ($)	1000	8000	8875	2000	2000
Median ($)	300	1000	1940	100	375
Mean ($)	539	1542	2367	223	499
Coeff. of Disp.	1.24	.95	.81	1.38	1.01

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320. Source: HMTA Penalty Study, *supra* note 318, at 25, 41.

321. "Initial assessment" is the penalty amount initially proposed in the prosecutor's notice of violation.

322. Coefficient of dispersion (ratio of standard deviation to mean). W. Spurr & C. Bonini, Statistical Analysis for Business Decisions 84-85 (1973).

323. "Final assessment" is the penalty amount finally accepted in settlement of the claim.

The discretion of HMTA prosecutors, like that of criminal prosecutors, has two dimensions: charging and sentencing. The charging decision involves the nature and the number of offenses to cite in the notice of violation. Even though the governing regulations prescribe highly objective and readily verifiable standards of conduct, agency prosecutors exercise considerable discretion over the selection of detected violations to cite, the aggregation or disaggregation of related offenses, and the appropriate unit for defining the violation (by separate package or entire shipment, per day or per incident). The prosecutor's sentencing discretion consists of selecting the amount of the fine to propose and accept in compromise within the statutory ceiling of $10,000 per violation.

Neither the Secretary nor the administrators of the agencies that enforce HMTA have made much effort to constrain the exercise of their prosecutors' sentencing discretion by explicit instructions. FRA did promulgate a staff instruction that specifies "benchmark" initial assessment amounts for 14 of the most common serious violations (for example, overfilling tank cards, failure to placard, or failure to place a buffer car between certain dangerous loads and crewed cars).(324) But these are only "points of departure," and FRA attorneys are exhorted to consider all of the statutory considerations in calculating the actual amount in any given case. The Coast Guard Commandant issued an instruction relating to penalty assessments.(325) But it goes no farther than to recite the importance of distinguishing between "major" and "minor" violations (undefined) and to suggest consideration of compliance costs and compliance history. Neither of the other three agencies, nor the Secretary, has issued any guidelines on computing penalty levels, despite the recommendations of the Comptroller General (326) and the Department's own consultant.(327)

The low degree of precision that characterizes the Transportation Department's "sentencing" policy is not difficult to explain. None of the factors customarily impelling policymakers toward high degrees of regulatory transparency operate with much force here. The caseloads,

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324. See HMTA Penalty Study, supra note 318, at 14.

325. USCG, Commandant Instruction 16601.1 (July 7, 1978), described in HMTA Penalty Study, supra note 318, at 18.

326. Comptroller General of the U.S., Need for Improved Inspection and Enforcement in Regulating Transportation of Hazardous Materials (May 1, 1973).

327. HMTA Penalty Study, supra note 318, at 75-88.

first of all, are modest. The Department as a whole processed less than 350 penalty cases to completion in the twelve-month period ending on June 30, 1979. No single enforcement unit handled more than 130 cases. And, while the statute requires the Department to offer respondents an "opportunity for hearing," the procedure followed in most cases is highly informal. Although respondents contest initial notices of violations in about four of every five cases, rarely does the challenge involve more than an exchange of correspondence or informal conference.(328) The relatively modest penalties demanded in most cases discourage heavy investment in defensive tactics by respondents.

It is true that the nominal penalty assessment rarely measures fully the accused's stakes in a case. Nonpenalty costs associated with a determination of liability--such as the cost of correcting a violation or preventing its recurrence--can dwarf direct penalty costs.(329) But liability is rarely an issue in HMTA cases.(330) The substantive regulations rely very heavily on specification standards, compliance with which can be verified objectively by observation or testing. The multi-level screening process from inspection to prosecution, moreover, tends to filter out cases of dubious liability.(331) Since most nonpenalty costs flow from the determination of liability rather than computation of the penalty, the nominal penalty amount does in fact define a reasonable outer bound on the potential payoff from challenging a violation notice.

Quality control costs do not loom especially large in HMTA enforcement, either. In each enforcement unit except USCG, the prosecution function is concentrated in the hands of a few attorneys located at the agency's headquarters. Frequent interaction among these attorneys probably maintains decisional consistency at a fairly high level. USCG, by contrast, has decentralized the penalty-assessment function to its ten district offices. One would expect quality control to be a more serious problem in the USCG than in the other four agencies. Statistical analysis of internal decisional

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328. Id. at 30, 37.

329. See Diver, A Theory of Regulatory Enforcement, 28 Pub. Policy 257, 266 (1980).

330. See HMTA Penalty Study, supra note 318, at 33.

331. For a general account of this phenomenon, see Diver, supra note 329, at 280-91.

consistency conducted for the Department's General Counsel in 1980 strongly supports this intuition.(332)

Nor do clearer rules promise to save rulemaking costs. The agency's current investment in penalty-severity rulemaking is virtually zero since it is under no legal obligation to explain the basis of its initial assessments or final settlements. An increase in the number of cases imposed after a contested hearing would undoubtedly magnify the explanatory burden, but only modestly in view of the extreme judicial deference customarily extended to administrative sanctioning decisions.(333)

Penalty standards might plausibly enhance compliance with the substantive rules by more clearly communicating the consequences of their violation. This hypothesis is debatable even in principle, since the deterrent effect of uncertainty depends on whether the regulated population is risk averse or risk preferring.(334) If, as some assert,(335) modern businessmen are inherently risk averse, uncertainty could enhance deterrent impact. The pursuit of general deterrence in this context is itself controversial. Agency officials believe that most violations result from ignorance or carelessness, especially by low-level employees of carriers and shippers.(336) The cost of effectively monitoring and controlling their conduct may often exceed any plausible estimate of the expected cost of a first-time violation.

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332. See HMTA Penalty Study, supra note 318, at 45-48, 53-55, 58-61. The study found a high degree of internal variation in the FAA's assessments as well. But the FAA had employed a decentralized procedure for a portion of the study period.

333. E.g., Butz v. Glover Livestock Comm'n Co., 411 U.S. 182 (1975); Nowicki v. United States, 536 F.2d 1171 (7th Cir. 1976).

334. See Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum. L. Rev. 1435, 1472-73 (1979).

335. E.g., Breit & Elzinga, Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis, 86 Harv. L. Rev. 693, 704-706 (1973).

336. See HMTA Penalty Study, supra note 318, Appendix D, at 4.

Even if one accepts the premise that greater certainty would enhance compliance, the incremental contribution made by penalty standards would be small. The probability of detection and punishment is, for most regulated firms, very small and highly uncertain. (337) Similarly, the potential nonpenalty costs of committing an HMTA violation--such as potential tort liability for a resulting mishap--are subject to highly unpredictable odds and magnitudes. Estimating the total predicted cost--magnitude times probability for each adverse consequence--of a potential violation is thus enveloped in a fog of uncertainty that even a perfectly transparent penalty formula would barely penetrate.

The greatest source of resistance to policy clarification here, however, seems to be concern for incongruity. Agency prosecutorial personnel have steadfastly maintained that bright-line rules would impair their ability to tailor the sanction to the precise circumstances of the offense and the offender. (338) This position has much force. Discretion at the remedial stage is often a safety valve for the overinclusiveness of substantive rules. (339) It manifestly serves that function in this instance. In their single-minded pursuit of objectivity, the Department's primary rules inevitably sweep large categories of harmless or beneficial conduct into the prohibited zone. Enforcement discretion enables the Department to respond to legitimate contextual considerations--such as the location, size, and other contents of the shipment, the degree of personal culpability or corporate neglect, and the numbers of people exposed--that determine the hazard presented by an individual violation.

Articulated penalty standards could also undermine the corrective function of enforcement by impeding adjustment to peculiarities of the offender's situation. Sometimes a heavy hand is necessary to get the attention of remote or recalcitrant upper-level management, while, other times, securing a firm commitment to correct violation-breeding practices diminishes the utility of added punishment. This is not to

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337. In 1979, DOT conducted 103,246 inspections or about one for every 884 estimated shipments. Comptroller General of the U.S., Programs for Ensuring the Safe Transportation of Hazardous Materials Need Improvement 7, 39, 57 (November 4, 1980). Only 2587 enforcement cases were actually commenced that year, id. at 57, and approximately 350 cases were closed with imposition of a fine. See Table I supra.

338. See HMTA Penalty Study, supra note 318, Appendix D, at 6.

339. See Diver, supra note 329, at 279; Veljanovski, Economic Aspects of the Enforcement of British Factory Legislation (draft, February, 1981).

say that more transparent penalty standards must necessarily ignore these contextual concerns, but rather that any sensible body of standards would necessarily preserve a generously open texture.

Cries of incongruity have a hollow ring, of course, if the current regime produces wildly incongruent outcomes. The evidence suggests otherwise, however. On an aggregative basis, at least, the agency's behavior seems consistent with an "efficient deterrence" model. That is, the bulk of penalty collections relate to activities--bulk shipment of highly explosive, flammable, or toxic materials by rail or highway--that generate most of the social losses from hazardous materials transportation.(340) Similarly, the reported rate of recidivism is quite low,(341) suggesting the success of the agency's "correctional" policy. Against that backdrop, the benefits from anything more than a modest elaboration of penalty criteria are unlikely to be great enough to justify the rulemaking costs and enhanced incongruity risks.

H. Bank Chartering By The Comptroller of the Currency

The Office of the Comptroller of the Currency (OCC) derives its authority to grant charters to national banks from the National Bank Act of 1864.(342) Aside from some essentially procedural requirements, the only statutory standard for bank chartering is as follows:

> If...it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate....But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose

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340. See Diver, Regulatory Plea-Bargaining: A Case Study of the Enforcement of the Hazardous Materials Transportation Act (paper presented at the 1981 Annual Meeting of the American Political Science Ass'n, New York, September 3-6, 1981), at 9-11.

341. HMTA Penalty Study, supra note 318, at 23, 28.

342. Act of June 3, 1864, ch. 106, 13 Stat. 99, codified in relevant part at 12 U.S.C. §§21-27 (1980).

> that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter.(343)

After an initial decade of restrictive chartering, Comptrollers adopted an "automatic approval" policy, granting charters to any applicant that met the minimum legal requirements.(344) A rash of bank failures in the 1890's and the Panic of 1907 convinced Comptrollers to begin tightening the reins in order to prevent "overbanking." Bank chartering became especially restrictive as the number of bank failures increased in the late 1920's and early 1930's.(345) Under the rubric of promoting the "needs and convenience of the community," Comptrollers maintained a vigilant watch at the gates to ward off the spectre of destructive competition. Although some recent comptrollers have loosened their grip, the principle of discretionary control over entry has become enshrined in banking regulation.

The charter approval process is procedurally informal and organizationally centralized.(346) The applicant's organizers, usually following a preliminary meeting with a regional OCC

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343. 12 U.S.C. §27 (1980). The Federal Deposit Insurance Act of 1935, 12 U.S.C. §1816 (1980), augmented this sparse language modestly. Since national banks must have deposit insurance, a charter applicant must satisfy the Act's standard for insurability. But this "standard" merely enumerates six factors to be considered by the Comptroller: The financial history and condition of the bank, the adequacy of its captial structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purpose of this chapter.

344. J. White, Banking Law 406-07 (1976).

345. Majority Staff Study on Chartering of National Banks: 1970-1977, Sen. Comm. on Banking, Housing and Urban Affairs, 96th Cong. 2d Sess. 5-6 (1980) [hereinafter cited as Staff Study].

346. For descriptions of the process see Scott, In Quest of Reason: The Licensing Decisions of the Federal Banking Agencies, 42 U. Chi. L. Rev. 235 (1975); Staff Study, supra note 345, at 11-28.

official, file an application form requiring detailed information on the proposed bank's capitalization, primary service area (geographical, economic, and demographic data), competition, services, facilities, operating income projections, and principals' backgrounds.(347) The regional office then assigns a bank examiner to conduct a field investigation of the same matters and to prepare a confidential report and recommendation.(348) The regional administrator appends his own comments and recommendation and forwards the file to OCC headquarters, where it is subjected to sequential review by staff analysts and administrators. Until quite recently,(349) the Comptroller personally made the final decision, either rejecting the application or granting preliminary approval. Following preliminary approval the applicant has 18 months to raise capital and appoint a chief executive officer. The applicant must then secure final approval before commencing operations.

Throughout most of the program's history, Comptrollers have made very little effort to confine their statutory discretion by articulating more precise criteria for chartering decisions. Virtually no "common law" of bank chartering has evolved, since Comptrollers very rarely explained their decisions and even then, provided only extremely "curt" explanations.(350) Prior to 1976, the Comptroller's published regulations provided precious little additional detail. The rules merely listed five factors that must be investigated as part of a bank chartering case:

(1) The adequacy of the proposed bank's capital structure.

(2) The earning prospects of the proposed bank.

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347. The forms are listed at 12 C.F.R. §5.20(i) (1980). For the 1976 version, see Staff Study, _supra_ note 345, at 158-87.

348. _See_ _id_. at 188-200.

349. The Comptroller has recently delegated authority to approve charter applications to two Deputy Comptrollers. In other respects the process is still essentially the same as described in the text. Letters from Steven J. Weiss, Deputy Comptroller for Bank Organization and Structure, OCC, to Jeffrey S. Lubbers, Acting Research Director, ACUS, August 19, 1982. Interim bank charters issued in connection with corporate reorganizations are approved by Regional Administrators.

350. Scott, _supra_ note 346, at 261-68.

(3) The convenience and needs of the community to be served by the proposed bank.

(4) The character and general standing in the community or [sic] the applicants, prospective directors, proposed officers, and other employees, and other persons connected with the application or to be connected with the proposed bank.

(5) The banking ability and experience of proposed officers and other employees.(351)

This list provided virtually no independent guidance since it largely tracked the language of the Federal Deposit Insurance Act.(352) The source of greatest guidance was the application form itself which, in its numerous detailed questions, suggested more exhaustively the factors relevant to the decision. None of these sources, however, gave even a hint about the method of evaluating or combining the several factors into a decision.

This state of extreme regulatory opacity led Professor Kenneth Scott, in his 1975 study, to criticize the Comptroller for failing to "provide a clear and consistent explanation of what he is doing."(353) Based on his report the Administrative Conference of the United States recommended that the bank chartering agencies, including OCC, "undertake to provide a full statement of their objectives in approving or denying applications for charters ...and ...define in concrete terms the standards to be applied."(354) The preferred method for articulating policy, the Conference suggested, was "adoption of policy statements and rules of general applicability."(355)

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351. 12 C.F.R. §4.2(b) (1974).

352. See note 343, supra.

353. Scott, supra note 346, at 268.

354. ACUS Recommendation 75-1(1), 1 C.F.R. §305.75-1(1) (1977).

355. Id.

On June 4, 1976, the Comptroller published in the Federal Register a document entitled "Policy Statements on Corporate Activities," setting forth OCC's policies governing bank charters and other actions.(356) They began on a decidedly cautious note:

> The policy statements are intended to be applicable in the large majority of the decisions. However, the Comptroller may depart from these policies when he deems it appropriate to do so. Normally, the reasons for any such departure will be explained.(357)

With that caveat, the Comptroller announced an overarching policy goal ("to maintain a sound national banking system without placing undue restraint upon entry into that system") and several subsidiary desiderata (to avoid chartering "so many banks that none can grow to a size sufficient to offer a full range of needed services," to "admit only those qualified applicants that can be economically supported and profitably operated," and to protect the "viability of a newly chartered independent bank"). The policy statement went on to enumerate four "banking factors" ("income and expenses," "management," "stock distribution," and "capital"), five "market factors" ("economic condition and growth potential," "primary service area," "location," "population," and "financial institutions"), and several "other factors" to be considered in evaluating an application.

As a contribution to regulatory precision, the policy statement's impact was modest at best. It unquestionably relieved the starkness of the Comptroller's previous unelaborated list of factors. Indeed, the 1976 guidelines occasionally approached the use of bright-line tests (for example, the "general" ten percent limit on stock ownership by any one shareholder, the requirement that a "majority of the stock" be issued to local interests, capitalization "normally" not less than $1,000,000 and sufficient for three years' operation). But the guidelines expressed most decisionally relevant factors with a good deal less precision. Criteria for evaluating the qualifications of organizers and directors for example, were still expressed in exclusively conclusory terms ("reputations evidencing honesty and integrity," "employment and business histories demonstrating success,"

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356. 41 Fed. Reg. 47964 (1976).

357. Id.

"responsible in financial affairs").(358) Criteria relating to "overbanking" (usually captured under the rubrics of "need" and "profitability") were even more obtusely phrased. The most concrete provision relating to "need" is the blanket prohibition against chartering a new bank that "would threaten the viability of a newly chartered independent bank." The statement leaves one to guess what "viability" means and how serious a "threat" is necessary. Since this protection will not "typically" exceed one year, however, the cost of this opacity is mitigated.

Beyond protection of new independents, the statement's only contributions to clarification of the "need" factor are: 1) the laundry list of "market factors," 2) the expressed intent to balance competition and soundness; and 3) the constraint that "it is not in the public interest to charter so many banks that none can grow to a size sufficient to offer a full range of needed services." These provisions provide precious little guidance to applicants, challengers, or decisionmakers on either the degree to which charter policy would be used to protect incumbents (other than infant independents) from competitive injury and the compensating benefits of new entry that might override injury to incumbents. *A fortiori*, the guidelines say nothing about how OCC intended to measure such injury or benefits.

The 1976 guidelines are equally inarticulate on the subject of the applicant's future profitability. They require the applicant to prepare "realistic" projections of income and expenses and to document the "economic condition or growth potential" of the market, but they offer no guidance on how to measure or combine the various enumerated "market factors" into a reliable profitability projection. Nor, indeed, do they even indicate what "economically supported and profitably operated" mean.

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358. It may be that these terms are well enough understood to narrow the range of dispute to trivial dimensions. Some support for this assessment may be derived from the findings of the Senate staff study that "organizer/management problems" alone accounted for only 6.8 percent of charter denials between 1970-1977. But this factor was involved jointly with "inadequate need" in another 24.5 percent of denials. And denial rate figures may understate the importance of this issue, given the apparent willingness of applicants to replace persons found objectionable by OCC. Staff Study, *supra* note 345, at 31.

The 1976 policy statement did not still OCC's critics. Although an Administrative Conference staff report eulogized the policy statement as a "work of art to be envied by federal regulation writers,"(359) Professor Scott viewed the statement as a "modest baby step in the right direction, but in no sense do they implement the intent of the recommendation."(360) A majority staff study for the Senate Banking Committee concluded in 1980, moreover, that: "OCC's reliance on vague chartering standards...have exposed the chartering process to charges of favoritism and arbitratry decisionmaking."(361) The study relied on the high rate of disagreement among internal OCC reviewers and alleged inconsistencies in handling specific cases to support its characterization.(362) Finding OCC's economic projections to have been far off the mark in several case studies, the staff study concluded that the "community need" criterion "is a poor indicator of a new bank's likely prospects"(363) and proposed greater reliance on organizer-management factors.

On October 15, 1980, almost simultaneously with release of the staff report, the Comptroller issued a revised policy statement. While the statement speaks of "clarifying" previous policy and "facilitat[ing] applicant and public understanding"(364) its principal function was to articulate a policy shift toward a more competitive bank entry policy. The Senate study had criticized OCC for adopting an excessively "restrictive" entry policy.(365) And in the Depository Institutions Deregulation and Monetary Control Act of 1980,(366) enacted earlier that year, Congress had evinced a generally procompetitive attitude toward banking.

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359. William Bush, Licensing Decisions of Federal Banking Agencies -- An Update 8 (ACUS Staff Study, 1977).

360. Quoted in id. at 9.

361. Staff Study, supra note 345, at iv.

362. Id. at 18-19, 33.

363. Id. at 55.

364. 45 Fed. Reg. 68603 (1980).

365. Staff Study, supra note 345, at iii, iv.

366. Pub. L. 96-221, 94 Stat. 132.

The following passage from the 1980 policy statement summarizes this philosophical shift:

> [I]t is the policy of the Office to foster competition through the chartering of national banks proposed by organizers and proposed directors (hereinafter, "the organizing group") whose experience and resources, plans for establishing and operating a bank (hereinafter, "the operating plan"), financial strength, competency and honesty indicate that, within the context of the economic and competitive conditions in the market to be served, the proposed bank will have a reasonable likelihood of success and will be operated in a safe and sound manner. It is not the policy of the office to ensure that a proposal is without risk nor to protect existing competitors from the competition a new bank will provide.(367)

Aside from this general statement, the philosophical shift is reflected primarily by the absence of any provisions concerning protection of incumbent banks.

As an exercise in policy "clarification" (as opposed to substantive revision), however, the impact of the 1980 statement is muddier. The sheer volume of words has increased since 1976. And some of those words provide greater "clarity." For example, the new rule suggests a time dimension for the "profitability" test, by noting that "most successful new banks are profitable, on a yearly basis, between the second and fourth years of business."(368) And the new rules, by noting that "deficiencies in one factor may be compensated for by strengths in one or more of the other factors,"(369) resolve a central ambiguity in earlier formulations: namely, whether each decisional factor was an absolute eligibility test or merely a part of one overall balancing test.

These contributions to verbal transparency are balanced by several moves in the opposite direction. For example, the rules have eliminated most of the 1976 per se rules relating to stock ownership and capitalization. Whether these changes achieve their

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367. 12 C.F.R. §5.20(c) (1981).

368. Id. §5.20(c)(3)(i) (1981).

369. Id. §5.20(c)(1)(i).

stated purposes -- "to minimize unwarranted government intervention and to promote competition"(370) -- remains to be seen. The vague rule-of-reason language that replaced them (such as "sufficient" capital(371) and "wide distribution of stock"(372)) seems as consistent with a restrictive as a competitive entry policy. In summary, the 1980 rules, while signaling an important substantive shift toward freer entry, do not advance the cause of regulatory precision. Although they will undoubtedly reassure potential entrants that their chances of success, as a group, are better than before,(373) they provide little incremental guidance to any particular applicant on how to improve its odds.

The circumstances surrounding bank chartering predict a low degree of transparency in the substantive standards. First, the likelihood that per se rules will produce costly incongruities seems high, if one assumes -- as Comptrollers emphatically have -- that the overriding purpose of entry restrictions is to maintain public confidence in the banking system by reducing the risk of failure. The likelihood that new entry will cause injury -- either through the entrant's failure or by weakening an incumbent -- plausibly seems to depend on a host of variables relating to the entrant's capabilities, its competitors' positions, and market conditions. These factors will vary widely from market to market and, as the history of chartering seems to indicate, can change markedly with shifts in economic conditions.(374)

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370. 45 Fed. Reg. 68604 (1980).

371. 12 C.F.R. §5.20 (c)(3)(iii) (1981).

372. Id. §5.20(c)(3)(iv)(B) (1981).

373. Statistics on the Comptroller's charter approval rate show that this policy shift had occurred well before issuance of the 1980 policy statement. The approval rate, which had fallen below 50 percent in 1976 and 1977, shot up to 75 percent in 1978, 81 percent in 1979, and 88 percent in 1980. See 1980 OCC Ann. Rep. 240; 1979 id. at 11; 1978 id. at 11; 1977 id. at 7.

374. For example, the charter approval rate has fluctuated dramatically from lows of 18 percent in 1965 and 1967, up to a high of 66 percent in 1973, then down to a low of 45 percent in 1977, and again dramatically upward since then. See 1965-1966 OCC Ann. Rep. 22; 1967 id. at 8; 1973 id. at 5; and note 373 supra.

The compliance-encouraging function of rule precision seems largely irrelevant here. Chartering standards are not, at base, aimed at modifying behavior. They are, rather, almost purely status-recognition rules whose function is to select applicants who can meet certain minimal character, experience, and financial qualifications and demonstrate some minimal quantum of community "need." It is true, of course, that the relative clarity of standards may influence the rate of applications and, consequently, the rate of entry. More precise criteria, by reducing uncertainty, might encourage applications from those otherwise dissuaded by the high costs of compiling the necessary economic data. During a time of perceived inadequacy of banking services, this factor might exert a stronger pull toward greater transparency. The evidence does not support this thesis, however, since the 1976 policy statement -- the high water mark of OCC charter rule precision -- is far more protectionist in tone than the 1980 rules, and was issued by a Comptroller (Smith) whose charter approval rates were the lowest in the decade.(375) Furthermore, Comptrollers who wish to encourage new entry can often encourage applications far more effectively by their actions than their words,(376) and more efficiently by making procompetitive public statements than by issuing rule changes.(377)

Neither do transaction costs present a very powerful case for a high degree of precision. Rule-application costs are not substantial. The Comptroller received, on average, only about 120 formal charter applications per year during the 1970's. The process for deciding cases is highly informal, consisting usually of only a field examination and several internal reviews. While organizers often have a sufficient stake in the outcome to demand far more expensive procedures, the courts and Congress have resisted pressures to impose them.(378) The availability of an opportunity to reapply or to seek entry into banking through the state regulatory system undoubtedly mitigates those pressures.

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375. See notes 373 and 374 supra.

376. During the past 20 years there has been a close correlation between changes in the charter approval rate and changes in the volume of applications. The direction of the casual relation, if any, is not clear.

377. For an asserted illustration, see Staff Study, supra note 345, at 7-8 (Comptroller James Saxon, at the beginning of his tenure in 1962-1963).

378. See Scott, supra note 346.

Furthermore, the decisionmaking process is highly centralized. Even after receiving blanket legislative authority in 1980 to subdelegate any power vested in his office by law (379) the Comptroller maintained fairly tight central control over chartering decisions.(380) This tight central control over the chartering process substantially reduces the need, found in many other programs, to use clear rules to control agency decisionmakers.

The rulemaking cost factor also cuts against increased clarity. If my earlier assertions about the risks of incongruity are correct, the cost of developing a transparent, yet congruent rule would be quite high. Preliminary efforts by staff economists to produce more rigorous models for predicting economic impact have been discouraging.(381) Nor does the Comptroller face the usual trade-off between ex ante and ex post policymaking costs to the same degree as other agencies, in view of the informality of the charter decisionmaking process and the minimal explanation for rejections demanded by reviewing courts.

In sum, the degree of precision with which Comptrollers have articulated charter policy, especially since 1976, seems fully consistent with the context in which they have operated. This is not to say that the substantive policy assumptions on which entry regulation rests are necessarily correct or sensible. They have been attacked fiercely in recent years and show signs of yielding. Nor is the extreme procedural informality characteristic of banking regulation necessarily defensible. But within the context of a system built on those substantive assumptions and implemented with that procedural informality, a substantial increase in charter rule precision would probably not produce benefits justifying its cost.

I. Comparative Renewal Broadcast Licensing Standards

The standards employed by the Federal Communications Commission (FCC) to select among competing applicants for a broadcast license, especially if one of them is an incumbent licensee seeking renewal, have long been regarded as a paragon of

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379. 12 U.S.C. §4a (Supp. 1981).

380. See 12 C.F.R. §5.3 (1981), and note 349, supra.

381. Interview with John Shockey, former OCC General Counsel in Washington, D.C. (January 10, 1981).

administrative opacity.(382) Despite countless proposals and several major efforts at reform, this body of standards has stubbornly resisted significant clarification.

The Federal Communications Act, embellished by FCC rules, articulates relatively transparent threshold criteria that specify minimal citizenship, financial, and technical qualifications for a broadcast license.(383) These include, for example, bright-line regulatory restrictions on joint ownership of other broadcast licenses or co-located newspapers(384) that have been judicially sustained against fierce attacks on their alleged incongruence.(385)

It is in the area of selecting among competing applicants who satisfy these threshold criteria that the FCC has been beset by such celebrated inarticulateness. Its 1965 Policy Statement represents a major effort to achieve "a high degree of consistency

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382. *See*, *e.g.*, Jaffe, The Scandal in TV Licensing, Harper's, Sept. 1957, at 77, 79; Schwartz, Comparative Television and the Chancellor's Foot, 47 Geo. L.J. 655 (1959); H. Friendly, The Federal Administrative Agencies 70-73 (1962); Jaffe, *WHDH*: The FCC and Broadcasting License Renewals, 82 Harv. L. Rev. 1693 (1969); Anthony, Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings, 24 Stan. L. Rev. 1 (1971); Botein, Comparative Broadcast Licensing Procedures and the Rule of Law: A Fuller Investigation, 6 Ga. L. Rev. 743 (1972); Geller, the Comparative Renewal Process in Television: Problems and Suggested Solutions, 61 Va. L. Rev. 471 (1975); Brinkmann, The Policy Paralysis in *WESH*: A Conflict Between Structure and Operations in the FCC Comparative Renewal Process, 32 Fed. Comm. L.J. 55 (1980).

383. *See* 47 U.S.C. § 310 (1980); 47 C.F.R. Part 73 (1981). The statutory standard for determining whether to grant an application to an applicant meeting these threshold criteria--unchanged since passage of the Communications Act in 1934--is "public interest, convenience, and necessity." 47 U.S.C. § 309(a) (1980).

384. 47 C.F.R. §§ 73.35, 73.240, 73.636 (1981).

385. *See*, *e.g.*, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 773 (1978); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

of decision and of clarity in our basic policies" regarding selection among competitors for an initial broadcastlicense.(386) On the surface, the Statement made only modest progress toward those objectives, since it merely enumerated seven factors to be considered--"diversification of control of the media of mass communications, full-time participation in station operation by owners, proposed program service, past broadcast record, efficient use of frequency, character, and other factors"--each of them defined in highly open-ended terms. The Policy Statement did, however, convey some information about the manner of evaluating the factors and the relative weights to be accorded the factors. For example, the statement described diversification as "a factor of primary significance"(387) and full-time participation as a factor of substantial importance".(388) The other factors were expected to be significant only in relatively exceptional cases.(389)

However modest the 1965 Policy Statement's contributions to "clarity," they appear momentous when compared with the FCC's policy on comparative selection in renewal cases. Once the desirable frequencies had been fully allocated and assigned, the major avenue for entry into broadcasting became challenges to the renewal of incumbents' licenses. This fact, plus the enormous financial stakes in major market broadcasting, focused great attention on the comparative renewal process.

Before 1970, one had only a handful of administrative orders in comparative renewal cases from which to glean the FCC's policy.(390) Although these opinions were hardly a model of

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386. Public Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 393 (1965).

387. Id. at 394.

388. Id. at 395.

389. For example, "[d]ecisional significance will be accorded only to material and substantial differences between applicants' proposed program plans" (id. at 397); "[a] past [broadcast] record within the bounds of average performance will be disregarded" (id. at 398).

390. Hearst Radio, Inc. (WBAL), 15 F.C.C. 1149 (1951); Seven (7) League Productions, Inc. (WIII), 1 F.C.C.2d 1597 (1965); RKO General, Inc. (KHJ-TV), 5 F.C.C.2d 517 (1966); WHDH, Inc., 16 F.C.C.2d 1 (1969), 17 F.C.C.2d 856 (1969), aff'd sub nom, Greater Boston Television Corp. v. F.C.C, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

clarity, they seemed to stand for the proposition that past performance by the incumbent and continuation of existing service were the paramount concerns.

In a 1970 Policy Statement the FCC made an effort to "contribute to clarity of our policies" by setting forth its standard to govern the selection process in contested renewal cases.(391) The Policy Statement, which purported to codify existing practice, identified the incumbent's "past record" in the "last license term" as the critical factor.(392) If the incumbent's broadcast service had been "substantially attuned to meeting the needs and interests of its area" and free of "serious deficiencies," renewal would be granted without regard to the quality of the challenger's application.(393) If not, the agency would weigh the comparative merits of the competing proposals, favoring a promising challenger.

Displaying its inexhaustible capacity for understatement, the FCC conceded that its standards "lack mathematical precision."(394) Nonetheless, they would have simplified matters to a degree by focusing attention--at the initial stage at least--on only the one "factor" of the incumbent's past record. The heavy weight placed on this factor, however, highlighted its hopeless vagueness,(395) and shortly after issuing the Policy Statement the FCC opened Docket 19154 to develop "some pertinent standards" to define "substantial service."(396) In its Notice of Inquiry, the FCC specifically requested comments on a proposed set of mathematical guidelines for the minimal amount of broadcast time (expressed as a percentage of total on-air time and of prime

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391. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424, 424 (1970).

392. Id. at 427.

393. Id at 425.

394. Id. at 426.

395. The Policy Statement's only effort to clarify its criteria was a forlorn list of equally uninformative synonyms for "substantial" and "minimal" quoted from Webster's Dictionary. Id. at 426.

396. Notice of Inquiry, In the Matter of Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 27 F.C.C.2d 580, 580 (1971).

time) to be devoted to "local programming," "news," and "public affairs."(397) The proposal also offered financial criteria for ascertaining the guideline figure applicable to a particular station. Although the proposal did not attempt to define the three programming categories and was careful to treat the standards only as "*prima facie* indications of substantial service,"(398) the proposal certainly represented a quantum leap in transparency.

The ink was scarcely dry on the Notice of Inquiry when the D.C. Circuit invalidated the 1970 Policy Statement because it effectively denied challengers the "full comparative hearing" guaranteed by the Communications Act,(399) as interpreted in the *Ashbacker* case.(400) The FCC, seizing on the court's dictum that "*superior* performance should be a plus of major significance"(401) and its invitation to the FCC to "clarify in both quantitative and qualitative terms what constitutes superior service" in rulemaking,(402) interpreted the decision to "reinforce" the need for the undertaking embraced within Docket 19154.(403) Conceding that it could no longer exclude the diversification issue from comparative cases, the FCC expressed the opinion that it would be "impossible to formulate any general standard" with respect to diversification.(404) The only reason offered for this conclusion

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397. *Id.* at 582.

398. *Id.* at 583.

399. Citizens Communication Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971).

400. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), discussed at 447 F.2d 1210-12.

401. 447 F.2d at 1213 (emphasis original). The Court attempted to clarify these comments in a supplementary opinion at 463 F.2d 822, 823 (1972).

402. 447 F.2d at 1213 n. 35.

403. Further Notice of Inquiry, 31 F.C.C.2d 443, 443 (1971).

404. *Id.* at 445.

was that the "matter turns upon the facts."(405)

Despite the receipt of numerous comments and the issuance of two further notices of inquiry in 1973,(406) it was not until March 9, 1977, that the Commission issued a Report and Order finally disposing of Docket 19154 by concluding that quantitative program standards should not be adopted.(407) To the extent that the Order contains any affirmative statement of the renewal standard, it is perhaps this:

> [T]he renewal applicant must . . . continue to run on its record, and we believe that that record should be measured by the degree to which the licensee's program performance was sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal. Where the renewal applicant has served the public interest in such a substantial fashion, it will be entitled to the "legitimate renewal expectancy" clearly "implicit in the structure of the [Communications] Act.". . . . Thereafter, we will direct our attention to the comparative factors set forth in the 1965 Policy Statement. . . . While that policy statement will otherwise govern the introduction of evidence in the comparative renewal proceeding, the weight to be

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405. Id. The Commission did repeat an earlier assertion that any effort at "overall restructuring" of industry ownership patterns should be accomplished by rulemaking. Id. at 445 (echoing a point made in the 1970 Policy Statement, 22 F.C.C.2d at 427-28). But it is apparent from its emphasis on the term "overall" as well as its subsequent behavior (see, e.g., Multiple Ownership of Standard, F.M., and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975)), that the F.C.C. referred here to threshold qualifications standards for multiple or joint ownership, not complete criteria for defining the content and weight of the diversification factor in comparative hearings.

406. Second Further Notice of Inquiry, 43 F.C.C.2d 367 (1973); Third Further Notice of Inquiry, 43 F.C.C.2d 1043 (1973).

407. Report and Order, 66 F.C.C.2d 419 (1977), aff'd sub nom. National Black Media Coalition v. FCC, 589 F.2d 578 (D.C. Cir. 1978).

> accorded the legitimate renewal expectancy of the incumbent licensee and the significance of other comparative considerations will depend on the facts of the particular case.(408)

This "standard" is, to say the least, opaque. Its application in the celebrated Cowles case(409) demonstrates its almost infinite elasticity. There, the FCC managed to renew the incumbent's television station license by finding its "superior" past performance(410) sufficiently weighty to overcome its opponent's apparent advantage in the character, diversification, and integration categories. The Commission made these apparent advantages disappear with a series of rapid gestures that a professional magician would envy. But the beauty of its performance was apparently lost on the D.C. Circuit, which rejected the FCC's reasoning as "completely opaque to judicial review, fall[ing] somewhere on the distant side of arbitrary."(411)

Undaunted, the FCC returned to the drafting table and concocted a new rationale for the same result.(412) This opinion more candidly conceded to the challenger advantages on the standard comparative criteria and devalued the incumbent's past broadcast record from "superior" to "substantial." But this didn't prevent the Commission's magical scoreboard from once again declaring the incumbent the winner. A weary Court of Appeals finally threw in the towel,(413) and another renewal challenge had

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408. 66 F.C.C.2d at 430, citing Greater Boston Television Corp. v. FCC, 444 F.2d 841, 854 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971).

409. Cowles Florida Broadcasting, Inc. (WESH-TV), 60 F.C.C.2d 372 (1976), rev'd sub nom. Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 50 (D.C. Cir. 1978), petition for cert. dismissed, 441 U.S. 959 (1979), reinstated, 86 F.C.C.2d 993 (1981); aff'd, 683 F.2d 503 (D.C. Cir. 1982).

410. One of the more amusing ironies in the Commission's tortured reasoning was its rejection of the Administrative Law Judge's label for the incumbent's past performance ("thoroughly acceptable") as "too vague to be meaningful." 60 F.C.C.2d at 417.

411. 598 F.2d at 50.

412. 86 F.C.C.2d at 1006-18.

413. 683 F.2d 503 (D.C. Cir. 1982).

been successfully beaten back. While the case was on appeal, however, the FCC launched yet another inquiry into the feasibility of prescribing more concrete renewal standards.(414) But the wistful tone of the Notice's plea for inspiration and its open hostility to quantitative standards counsel little optimism. And in its two most recent comparative renewal cases, the FCC has intoned its familiar mumbo-jumbo.(415)

What accounts for this steadfast adherence to extreme opacity, in the face of recurrent external criticism and internal calls for reform? The Commission's own words provide some explanation for its refusal to adopt particular verbal formulations. In its Report and Order terminating Docket 19154, for example, the Commission invokes congruence, compliance, and transaction cost concerns. "Increasing the amount of [favored] programming," it argued at one point, "would not necessarily improve the service a station provides its audience."(416) Licensees might simply "spread their resources thinner" or focus on trivial issues (the Commission's illustration is "canoe safety").(417) The FCC found, in short, no necessary congruence between a quantitative criterion and the underlying goal of responsiveness to "community problems, needs, and interests."(418) Similarly, while the Commission assumed a high rate of incumbent compliance with quantitative guidelines,(419) it expressed doubt that the guidelines would reduce uncertainty enough to "simplify the hearing process" or "offer a licensee any real assurance of renewal."(420)

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414. Notice of Inquiry, Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 88 F.C.C.2d (no. 2) (1981) at 21.

415. Radio Station WABZ, Inc., _____ F.C.C.2d _____ (1982) (FCC 82-314); Simon Geller, 90 F.C.C.2d 250 (1982).

416. 66 F.C.C.2d at 427.

417. Id. at 428. The illustration betrays the hopeless subjectivity of the Commission's underlying policy views. One can easily imagine a locality in which a sizable audience cares intensely about canoe safety.

418. Id.

419. 66 F.C.C.2d at 427 ("we believe that almost all licensees would adopt our standards of substantial performance as their own minimum standards. . . .").

420. Id. at 429.

Although the Commission was somewhat less articulate about its reasons for preferring the more opaque functional formulation of diversification and integration criteria, a concern for congruence apparently carried the day. The Commission feared that application of structural criteria--however predictable and easy to administer--would reduce program quality by destabilizing the broadcast industry and ousting experienced incumbents in favor of rank novices.(421)

Arguments like these may explain the rejection of the particular formulations at issue. But these few formulations surely do not exhaust the possibilities for a more transparent standard. Several other approaches, or elements of an approach, have been suggested, such as Robert Anthony's algebraic formula,(422) Judge Leventhal's lottery,(423) Commissioner Robinson's auction,(424) Commissioners Hooks' and Fogarty's checklist,(425) or the D.C. Circuit's "excessive and loud advertising" and profit reinvestment suggestions.(426) The interesting question is not so much why the Commission has failed to adopt any one of these proposals, but why it has been so completely incapable of adopting any more transparent formulation. The record supports Commissioner Robinson's frustrated conclusion that it simply cannot be done.(427)

Using our rudimentary cost-benefit framework, one could construct a plausible defense of the FCC's performance. For example, one could point to the enormous variety of local "community

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421. See, e.g., 22 F.C.C.2d at 427-28.

422. Anthony, supra note 382.

423. Star Television, Inc. v. FCC, 416 F.2d 1086, 1089, 1094-95 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969) (Leventhal J., dissenting).

424. Cowles Florida Broadcasting, Inc. (WESH-TV), 60 F.C.C. 2d at 435, 444-48 (Robinson, Comm'r, dissenting). The FCC has recently rejected the lottery option. Random Selection--Lottery Systems, 89 F.C.C.2d 257 (1982).

425. Report and Order (Docket No. 19154), 66 F.C.C.2d at 433, 438 (separate statement of Comm'rs Hooks & Fogarty).

426. Citizens Communication Center v. FCC 447 F.2d 1201, 1213 n. 35 (D.C. Cir. 1971).

427. Cowles Florida Broadcasting, Inc. (WESH-TV), 60 F.C.C.2d at 443-44

needs and interests" and the consequent high risk of incongruence posed by any uniform standard. One could further invoke First Amendment values to attach a very high social value to each increment of broadcast speech chilled or coerced by an incongruent rule. One could minimize the compliance function of transparent rules here by noting licensees' enormous built-in incentive to comply with FCC policies (however inscrutable). Similarly, one could depreciate the enforcement costs argument by pointing out the relative infrequency of comparative renewal challenges.(428)

There are, of course, countervailing arguments. Transaction (hearing) costs per case are very high, reflecting not only the life-and-death quality of license renewal decisions generally, but the enormous profitability of the broadcasting industry in particular.(429) The relative infrequency of contests, one might add, may be largely a result of the very regulatory opacity whose justifiability is the issue. An important conduct-regulating function of renewal standards is to "spur" potential competitors to challenge mediocre incumbents.(430) The spur of competition may well depend for its operation on the clarity of the selection criteria articulated. Few potential entrants will risk the substantial investment in mounting a renewal challenge without some reliable basis for estimating the odds of success. Obscure rules can thus defeat public service goals by insulating incumbents from challenge. The infrequency of renewal challenges, despite the consistently high rates of return in the industry, suggests that opacity may have had precisely this effect.(431)

The task of weighing competing arguments in support of or opposition to any particular policy formulation, never easy, is rendered impossible here, I believe, by a single factor that simply overwhelms the rest of the analysis: goal ambiguity. The political

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428. From 1961 through 1978, there were 17 comparative television hearings and 30 comparative radio hearings. Central Florida Enterprises, Inc. v. FCC, 598 F.2d 58, 61 (D.C. Cir. 1978) (denying petition for rehearing per curiam).

429. See Cowles Florida Broadcasting, Inc. (WESH-TV), 60 F.C.C.2d at 435 (Robinson, Comm'r, dissenting).

430. Policy Statement, 22 F.C.C.2d 424, 424-25 (1970).

431. An even better explanation, however, is the content of the FCC's de facto renewal policy: namely, the incumbent (almost) always wins. See Cowles Florida Broadcasting, Inc. (WESH-TV), 60 F.C.C.2d at 435, 442 (Robinson, Comm'r. dissenting).

system in this country has simply been unable to achieve anything resembling consensus on the meaning of "good" performance in broadcasting. Views about what is wrong with broadcasting and what the government should do about it remain irreconcilably fragmented and divergent. One major reason for this may be a powerful cultural resistance to government censorship that discourages explicit public debate about how the government should go about assessing the quality of broadcast performance.(432) The result is chronic inability to reduce value conflict to manageable dimensions.

One of the more visible manifestations of this general state of goal ambiguity is the protracted conflict between the FCC and the D.C. Circuit on the subject of "renewal expectancies." A majority of the Commission, responding in large part to the hopeless intractability of the performance criterion, proposed in 1970 and again in 1977 that comparative evaluation be abandoned altogether.(433) Renewal would be automatic, at least in the absence of egregious misconduct warranting license revocation. This solution would, in effect, reconcile conflicting conceptions of the "public interest" by adopting a free-market (advertiser-sovereignty) model. The D.C. Circuit, however, has staunchly resisted this model as flatly inconsistent with the Communications Act.(434) Whatever conception or conceptions of the "public interest" may be consistent with the Act--and the judges of the D.C. Circuit furnish precious little insight into what those might be--this particular one is not.

What the Commission is doing, then, can be explained as either 1) avoiding policy choice or 2) trying to conceal a distinct, but improper policy choice from the prying eyes of reviewing courts. Either way, opacity is the predicted--if not wholly honorable--tactical response. The Commission's existing "standard" avoids any explicit elevation or subordination of politically contending values. It also provides a particularly dense smokescreen behind which it could seek to pursue a deliberate strategy of consistently

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432. See Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 54 (D.C. Cir. 1978) (citing "First Amendment questions" raised by "inquiry into the content of programming"). Cf. Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969) (FCC must walk a "tightrope between saying too much and saying too little").

433. See Policy Statement, 22 F.C.C.2d 424 (1970); Report and Order (Docket No. 19154), 66 F.C.C.2d 419, 429 (1977).

434. See Central Florida Enterprises, Inc. v. FCC, 598 F.2d at 51.

favoring incumbents. One can assuredly criticize the Commission's inarticulateness, then, but only if one is sanguine about the prospects that the Congress or the Commission can first narrow the range of underlying value conflict.

V. RULE PRECISION: OBSERVATIONS AND RECOMMENDATIONS

A. Interagency Comparisons

The case studies reveal interesting variations among agencies with regard to both the absolute degree of verbal precision employed to express their policies and their pattern of evolution over time. The rules studied range in apparent precision from the FAA's pellucid criterion for pilot retirement to the FCC's opaque broadcast license renewal criteria and the DOT's virtually nonexistent HMTA penalty standards. Most formulations fall between these extremes, exhibiting a mixture of relatively transparent and relatively obscure features -- the sharpness of SSA's medical and vocational appendices and the bluntness of its "equivalency" criterion; the mysterious nonexlusivity of SEC's well-charted "safe harbor." The mix of opaque and transparent elements varies from rule to rule. OCC's bank chartering rules contain very few bright-line tests among its fuzzily defined and essentially unweighted factors. The Parole Board combines highly objective factors into a tight matrix, but then constrains permitted outcomes only loosely by an arithmetic range with a verbally unguided escape hatch. The Labor Department clearly lights the employer's path through recruitment and wage determination, but leaves the hiring decision largely in the shadows. If nothing else, the nine case studies attest to the variety of linguistic structures available for accommodating the age-old conflict between certainty and flexibility.

Despite the difficulty of ranking different rules with respect to degree of precision, impressionistic interagency comparisons provide some support for intuitive hypotheses about administrative rule precision. One such hypothesis is that, the more heterogeneous the conduct or conditions confronted by a rule, the less transparent a verbal formulation it will assume. The basis for this hypothesis is that complete reliance on hard-line rules will generate unacceptably large incongruity losses in such settings. The case studies provide some evidence to support this hypothesis. Although both the FAA's age-60 rule and the SSA's disability definition attempt to define the point at which a person becomes incapable to perform work, the former (applicable to a single occupation) is more transparent than the latter (applicable to all occupations). Similarly, the Labor Department's rules for certifying aliens' eligibility for domestic employment are more exact than the INS's rules for determining aliens' eligibility for domestic residence. One could even try to explain the relative precision of bank chartering and broadcast renewal rules as inversely related to the diversity of these two industries' products (and, hence, the heterogeneity of public concerns potentially implicated by their licensure). But at this point, comparative assessment of "heterogeneity" becomes awfully slippery. And the case studies seem to offer at least one counterexample: The greater precision of parole guidelines ("sanctioning" standards for all federal crimes) than HMTA penalty standards (sanctioning standards for only one class of offenses).

A second hypothesis is that agencies with a highly decentralized enforcement process will rely more heavily on specific rules as an internal quality-assurance mechanism. The case studies provide modest support for this proposition. Of the four facially vaguest rules, three were administered in a tightly concentrated fashion (broadcast license renewal, bank chartering, and HMTA penalties). But one--change-of-status rules--involves a decentralized operation. The four most transparent rules (age 60, underwriter, labor certification, and disability) involve two agencies of each type.

A related transaction-cost hypothesis--that caseload volume and rule precision correlate--receives stronger support. At the low-caseload volume extreme--broadcast renewal, bank chartering, and HMTA penalties--one does encounter the least articulated policies. At the other pole--disability determinations--the rules are highly elaborated. But in between, the relationship is erratic (compare change-of-status, a high-volume, low-transparency regime, with age 60, low-volume, high-transparency).

Another dimension on which to compare the nine agencies is the pattern of evolution over time. Here again, one is struck by the variety. One agency (the FAA) has clung stubbornly to an extravagantly transparent rule from day one, while others (FCC, INS, and DOT) have persistently maintained opaque formulations. The other agencies studied made changes in their rules that involved major shifts in degree of verbal precision. In some (SSA and SEC), the pattern of evolution is a steady progression toward transparency and complexity. In others, after a quantum increase in both dimensions, the evolution either stalled (Parole), or showed signs of reversing (OCC and, to a lesser extent, DOL). In no agency studied has there been a pronounced move from transparency toward opacity or from complexity toward simplicity. The heavy reliance on previous ACUS studies in the selection of case studies undoubtedly biased the sample in this regard. But the hypothesis that rules will, over time, generally become more transparent and complex, is hardly novel nor surprising.

Explaining the variations among agencies is more difficult. One plausible explanation is that rule transparency will grow with caseload. Comparing the rapid growth of disability claims with the relative stability of broadcast renewal challenges and bank charter applications supports that thesis. But the INS's vague status-adjustment policies managed to survive substantial caseload expansion, and quantum leaps in the articulation of SEC and Parole Board policies occurred during times of caseload stability. Similarly, one would expect an increase in administrative decentralization to correlate with policy articulation. This happened at the Parole Board, and to a lesser extent, at SSA. Although there are no clear counterexamples, the number of cases involving a significant change in this variable is too small to support firm conclusions.

That these various hypotheses for explaining interagency variations fare rather indifferently need not trouble us unduly. Each, first of all, focuses on the effects of only one variable at a time. In a sample so small, it is impossible to hold other variables constant. Second, each uses a simplistic proxy for a more elusive underlying variable. Caseload, for example, is only one component of enforcement cost. Procedural formality and incentive to litigate should also be factored in. Likewise, "decentralization" is an imperfect index of quality-assurance cost; and "heterogeneity," an educated stab at the monstrous complexities of estimating incongruity losses. In light of these considerations, the results of our rudimentary interagency comparison are far from disappointing.

B. Recommendations

Turning from a descriptive overview to a more prescriptive mode, one can extract several recommendations for administrative draftsmen. The most basic recommendation to emerge from this study is that administrators should think consciously about rule precision as one dimension of their "output." More specifically, and less obviously, administrative draftsmen, when confronting a choice of verbal formulations, should isolate the three dimensions that I have called "transparency," "complexity," and "congruence," and consider explicitly the tradeoffs among them implicit in making that choice. In attempting to select a formulation that makes the most favorable tradeoff, policymakers should consider the implications of their choice for: 1) the rate of compliance by the regulated population, 2) the cost of rulemaking, both *ex ante* and *ex post* (including the cost of controlling the quality of decisions made in the course of enforcing the rule), 3) the cost of applying the rule and resolving disputes about its application, and 4) the extent of divergence between the outcomes actually produced by the rule and those desired by the policymaker.

Advice expressed at so high a level of generality is probably no more useful than it is controversial. Administrative policymakers face many competing demands on scarce analytic and creative resources. Faithful adherence to such a recipe is extraordinarily demanding. Most of us would be astounded to discover that policymakers seriously attempt to quantify all the costs and benefits associated with alternative rule formulations. The computation is far too complex and uncertain to reward such an enterprise.

Rather we would expect to find policymakers making these judgments intuitively and piecemeal, successively comparing a few alternatives according to a few simple qualitative criteria, relying heavily on guesswork and trial and error. Given the high cost of more rigorously analytic methods, this sort of qualitative, incremental approach can be expected to yield optimal results in a wide range of circumstances. On occasion, however, the magnitude of the interests at stake will justify heavier investment in more systematic analysis.

Whatever the decisionmaking model appropriate for a particular context, the analysis presented here provides a number of revealing clues about the circumstances in which a particularly heavy investment in generic policy articulation is likely to be justified. Agencies should use these clues as an aid to the allocation of their scarce analytic and drafting resources, as should their potential critics in focusing their attention.

1. Compliance Rate

A major affirmative argument for regulatory precision is to promote voluntary compliance by the rule's addressees. Consequently, situations in which compliance problems loom especially large are good candidates for enhancing rule precision. The case studies suggest that these situations will have the following characteristics.

First, they will involve rules that attach legal significance to conduct rather than status. Distinguishing between conduct-regulating and status-evaluating rules is not always straightforward, since virtually all rules seek to influence behavior in some ultimate sense. The form of the rule will, however, usually serve as a helpful guide to the intensity of its compliance function. Rules that explicitly forbid (or command) particular actions are most clearly conduct-regulating. Also in this category are definitional rules that help to locate the boundary line between prohibited and permissive conduct (or between mandatory and discretionary conduct). Thus, for example, the SEC's resale rules, though nominally definitional (helping to define "underwriter"), effectively mark the limits between transactions that are permitted (exempted) by the Act and those that the Act forbids. Put another way, they effectively prescribe when registration is mandated and when it is not.

Standards for the grant of a permission or privilege, on the other hand, often fall into the status-evaluating category. A clear example is the SSA's disability definition, which makes eligibility for a valuable benefit turn on the existence of an unexpected and unwanted chronic condition. Initial licensing standards, like the OCC's bank chartering rules, typically condition eligibility for a license on the presence or absence of certain durable characteristics (such as managerial experience and adequate capitalization) or short-range conditions beyond the applicant's immediate control (such as community "need").

This is not to say that standards for granting a benefit or privilege can never serve a behavior-inducing function. The Labor Department's criteria for granting alien labor certifications, though once based solely on status variables like occupational grouping and labor market characteristics, now expressly condition approval on certain employer conduct, in the form of a recruitment effort for domestic workers. More importantly, these rules have always served as an integral part of a general regulatory program designed to prevent employers from hiring aliens in preference to domestic workers or at wages below prevailing wage rates. Since the "status" that qualifies an employer to hire an alien --competitive wage rate and unavailability of domestic workers -- is partially controllable by the employer, the rules have a significant conduct-inducing role.

Similarly, standards for renewal of a scarce privilege may be more likely than standards for the initial grant to have behavioral objectives. As in the case of FCC broadcast licensing, the threat of nonrenewal is a powerful inducement for complying with the regulator's wishes during the term of the license. Renewal standards may thus double as conduct-regulating and merit-rewarding standards. Criteria for redetermining disability at periodic intervals, on the other hand, have no apparent purpose other than to assure the continued existence of the status on which eligibility for benefits depends.

The regulatory function of standards for imposing sanctions also varies with context. Severity of penalty occupies a central place in the theory of general deterrence. Consequently, criteria for determining penalty severity would seem to serve an important compliance-related function. But general deterrence is only one of several functions performed by punishment, and often a relatively unimportant function. For example, the Parole Board's guidelines promote incapacitative and retributive goals as much as general deterrence. In HMTA enforcement, the emphasis is on curing the specific violation and preventing its recurrence.

The second variable on which the magnitude of the compliance factor depends is the size and sophistication of the rule's audience. An investment in verbal clarification promises to yield the largest compliance payoffs when the rule's audience is large, diverse, and remote. An example from our case studies is the mass of job-seeking aliens and labor-seeking employers addressed by the labor certification rules. At some point, as I suggest in the INS case study, an audience may become so remote and unsophisticated as to be impervious to improved regulatory draftsmanship. But short of that point, verbally transparent rules often provide the most efficient method of communicating administrative policy to large groups. An agency (like the FCC, OCC, or even SEC) that deals with a smaller, more stable, and more sophisticated audience, on the other hand, can rely on alternative methods of communication such as response to informal inquiries, public statements, and the "grapevine."

The incremental payoff, in enhanced rule compliance, from clarifying a rule also depends on the expected level of evasive behavior by the regulated population. Rule clarification discourages evasion by reducing the perceived probability of its success. The expected level of evasive behavior is a function of two variables: The cost of compliance and the difficulty of concealment. Where compliance with a regulatory policy requires the rule's addressees to incur substantial incremental costs or to forego substantial benefits, the predicted rate of evasion is high. One might therefore expect aliens to make a greater effort to evade entry restrictions than change-of-status restrictions. Airline pilots, likewise, would have a more powerful inducement to conceal disqualifying infirmities than would healthy applicants for disability insurance to fabricate infirmities. Those who own large blocks of unregistered stock in especially shaky companies would have the greatest incentive to evade registration requirements.

The likelihood and magnitude of evasive activity also depends on the ease or difficulty of concealing prohibited conduct. Where concealment is relatively easy, as in the case of hiring illegal aliens, bright-line rules are needed to facilitate detection by investigative personnel and reporting by victims or observers. This justification applies with less force to conduct, like piloting commercial aircraft or public sale of securities, that is highly visible or easily traced. Private enforcement, through the tort system (e.g. hazardous material transportation standards) or industrial self-policing (e.g. the age-60 rule), may reduce the incremental deterrent value of rule clarification (unless, of course, the behavior of potential private enforcers itself depends significantly on the precision of the governing standard).

2. Rule Application and Enforcement Costs

Increasing a rule's verbal clarity should reduce the costs (to both the regulated population and the government) of applying it to specific transactions. The magnitude of this saving, and the consequent relative value of rule precision in different contexts, will depend primarily on the magnitude of the underlying rule-application transaction costs.

For present purposes, it is useful to distinguish between two kinds of rule-application transaction costs: "planning" costs and "enforcement" costs. Planning costs include resources expended on rule interpretation by private persons interested in determining the legal consequences of contemplated behavior or the legal status of a current or anticipated condition. Enforcement costs include the resources expended by both private interests and the government in the course of authoritatively applying a rule to a particular situation.

The relative magnitude of planning and enforcement costs depends in large part on the type of rule. Conduct-regulating rules typically generate larger planning costs than enforcement costs, whereas status-recognition rules involve little or no planning costs. Thus, the planning costs incurred by potential resellers of unregistered securities (and probably their brokers as well) undoubtedly dwarfed the cost of administering the SEC's clearance system. The only "planning" cost incurred by disability applicants, by contrast, is in deciding whether to apply for benefits.

The magnitude of planning costs presumably depends on both the volume and the value of the potential transactions to which the rule plausibly applies. Each potential transaction presents an occasion for an exercise in rule interpretation that could be simplified by clearer draftsmanship. So, for example, the labor certification rules come into play each time an employer contemplates hiring an alien. Yet, because the incremental value of an individual transaction is limited, employers probably will not often invest heavily in rule interpretation. Potential resellers of unregistered securities, on the other hand, often face a much higher exposure to loss from an incorrect interpretation. As a group, then, they can be counted upon to invest heavily in legal advice.

Enforcement costs are more easily estimated. The number of enforcement actions and the agency's share of enforcement costs are directly observable. Where the agency lacks relevant enforcement experience, it can make predictions based on plausible assumptions. Once again, the volume and value of regulated transactions will strongly influence the result. The larger the number of persons or events governed by the rule, the larger will be the number of times that the agency is called upon to make an authoritative determination. This is especially true of rules that govern the dispensation of benefits or privileges, since private applicants control the volume of cases. Agencies exercise far more control over the volume of formal proceedings for enforcing regulatory commands. But, even here, there is probably a rough correlation between enforcement activity and regulated activity.

The resources expended by participants in enforcement proceedings will depend generally on the value, to each party, of the desired outcome. Thus, an applicant for a labor certification will typically expend far less than an applicant for a bank charter or broadcast license. By the same token, the administering agency will expend more on bank chartering or broadcast licensing cases than on alien labor certifications.

The formality of the procedure afforded to a private applicant or respondent for contesting an adverse decision also influences the magnitude of enforcement costs. The more elaborate and formal the procedure, the larger an investment of resources one would expect. The disability insurance procedures are, for this reason, far more expensive than the parole release procedures. But the availability of formal procedures is no guarantee of their use. Bank charter applicants have fewer procedural rights than HMTA violators, yet unquestionably expend more of their own (and the government's) resources on the average proceeding. Only when the value of a favorable decision is held constant, do differences in procedural formality make a significant difference. For this reason, an applicant for a broadcast license will probably expend more than an applicant for an equally valuable bank charter.

3. Rulemaking Costs

An impediment to precision enhancement is the cost of initial rulemaking. Sometimes, as in the parole guidelines and disability case studies, development of more transparent rules involves a very substantial initial investment. As indicated earlier, this cost has two components -- the cost of conducting research and analysis so as to anticipate the rule's impact and the cost of securing agreement among participants in the rulemaking process.

It is interesting that agencies rarely invoke rulemaking costs explicitly as a justification for resisting precision-enhancing rule amendment. They tend, instead, to speak in the language of possibility: "it is impossible to foresee and enumerate all of the favorable and adverse factors which may be relevant and should be considered . . . ."(435) Taken literally, such an assertion is undeniably correct. But for agencies like the INS, FCC, and DOT, whose rules fall far short of the limits of foresight, such a statement must be interpreted as a statement about the costs and benefits of analysis. In effect, "it is too expensive to attempt to foresee and enumerate in any greater detail the factors which may be relevant and should be considered."

The weight to be attributed to the "rulemaking cost" element of such an argument depends on the extent to which initial rule clarification reduces the demand for subsequent policy specification. As discussed earlier, the administration of a program creates pressures -- usually, but not always, irresistible -- for elaboration of "policy" into intelligible principles. To the extent that an investment in initial rulemaking can mitigate these

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435. See 46 Fed. Reg. 9119 (1981) (INS explanation for rejecting proposed standards to govern the exercise of discretion).

pressures and displace later rulemaking, the "rulemaking costs" argument loses force as a defense for opacity.

Comparing the cost of initial rulemaking with the present value of future rulemaking activities thereby avoided is never easy. The case studies suggest two variables on which the outcome of such a comparison will depend: 1) The procedural formalities actually employed in administering the program, and 2) the degree of centralization of the decisionmaking process. At the one extreme is a program like parole release, vintage 1970, centrally administered through an extravagantly informal process consisting of no more than a perfunctory interview. Neither the statute nor the Constitution required a more formal procedure, and the applicants typically lacked sufficient knowledge or influence to demand more than the minimum offered. Reviewing courts, when their services were enlisted at all, accorded extreme deference to the agency. The result was a system that produced almost no external pressure for policy articulation. The constant interactions among decisionmakers gave them a kind of unspoken "feel" for governing policy, moreover, that held in check internal pressures for articulation.

At the other extreme is the disability program. Not only does the statute provide for an elaborate, and increasingly formal, sequential process of decisionmaking, but claimants actually utilize those procedures in a large number of cases. The agency faces insistent demands from genuinely disappointed claimants for intelligible explanations. Motivated by sympathy for the plight of most disability claimants, courts conduct a particularly probing and skeptical review of administrative denials.

In addition to its procedural formality at the top, the Disability Insurance program is administered at the bottom by an extremely decentralized apparatus. The myriad state vocational rehabilitation agencies and their consulting physicians and vocational experts would probably demand guidance from the agency in any event. And even if they did not, the problems of maintaining quality control in so farflung an empire would force the agency to invest in the formulation of guidelines and standards. Failure to do so would entail politically intolerable costs in uncorrected errors. While false negatives (erroneous denials) inflict at least as great a cost on society as false positives (erroneous grants), the latter seem more likely in a system administered (initially) by the states, but funded wholly by the federal government. The resulting pressure on the federal treasury would force the SSA to impose tight quality control to counterbalance the financial incentives for leniency.

For cases falling in between these two extremes, estimating the net rulemaking cost is more difficult. Where, as in the bank chartering case, the degrees of procedural formality and decentralization are both low, the net rulemaking cost of precision enhancement is likely to be positive. Where, as in labor certification or alien status adjustment, both are high, net rulemaking cost is likely to be negative. Intermediate cases such as broadcast licensing (high procedural formality, low decentralization), present the hardest case. Since rulemaking costs rarely loom very large relative to the other three factors, an assumption of zero net rulemaking costs will usually be justified unless one factor seems clearly to predominate.

4. Congruity Losses

Since the most powerful argument against adopting specific rules is their unavoidable incongruity, a strategy for achieving the optimal degree of rule precision must concentrate on minimizing such costs. To begin with, it is impossible even to incorporate this factor into the analysis without some reasonable degree of agreement on underlying policy objectives. "Incongruity" measures deviations of rule-dictated results from desired outcomes. As the broadcast regulation case study illustrates, identifying the class of "desired outcomes" is very difficult without relying exclusively on either the outcomes actually produced by the agency or the terms of the verbal formulation in which it happens to have couched its rule. Either way, the analysis is tautological -- the status quo produces an exact fit between actual and "desired" outcomes, or between rule-dictated and "desired" outcomes.

The only escape from this trap is to invoke some prior principle -- drawn from higher law or one's personal sense of good policy -- against which to judge administrative outcomes. Statutory language and legislative history help, to be sure, but the impetus for administrative clarification reflects the typical incompleteness and ambiguity of most statutory delegations. The outside observer is singularly disabled in this enterprise, possessing no authority, other than the force exerted by his private morality, to dictate gap-filling objectives. But the administering agency, on the other hand, has not only the legitimate authority but, most would say, the duty to fill in the gap left open by ambiguous legislative direction. Consequently, difficult as it may be for the outside observer to "measure" incongruity, he can still with a straight face and clear conscience urge agencies to do so and to clarify their rules in areas where the resulting incongruity losses are likely to be small.

In the search for such areas, it is essential to remember that incongruent outcomes can result from opaque rules as well as precise ones. Such outcomes may have different causes, to be sure. Opaque rules characteristically produce "errors of misapplication," whereas precise rules produce more "errors of misspecification." But there is no a priori reason to believe that, as between competing rule formulations, the more precise will necessarily yield more costly errors.

So, in searching for candidates for precision enhancement, the agency should first look for programs involving a high inherent risk of application errors. Programs administered on a highly decentralized basis tend to have this characteristic. The physical, organizational and professional isolation of decisionmakers in a program like disability insurance virtually assures that, in the absence of relatively concrete guidelines, individual decisions will deviate from the outcome desired by the agency in a high percentage of cases. While centralized review of decisions can reduce the rate of application errors, that corrective is itself costly.

The age-60 and parole guidelines cases illustrate a second context in which the net error-cost of bright-line rules may be especially small because of a high inherent risk of application-error. Sometimes an agency knows quite specifically what outcomes it wishes to prevent (e.g. airline accidents (FAA) or recidivist acts (Parole Board)), but it understands only imperfectly the processes that produce those outcomes. That is, the agency is unable (within reasonable limits of investigation) to find any method of discriminating between "good" and "bad" risks with a very high probability of success. Thus, for example, even if the "salient factor" scale mispredicts recidivism 40 percent of the time, the alternative "gut feel" method may have done little better. If the agency is convinced -- as the FAA has consistently claimed to be -- that no more individualized or open-ended method can significantly reduce the rate of application error, then the incongruity argument against using an admittedly clumsy bright-line test loses much of its force.

The FAA and Parole Board are to be commended for their willingness to invest in research on the consequences of their policies. Without such research, it is virtually impossible to determine the risk of error inherent in an existing opaque formulation and, therefore, the price likely to be paid by adopting a more precise formulation.

The other variable in measuring net incongruity losses is the cost of the "specification errors" likely to be produced by a bright-line rule. Agencies should favor precise formulations whenever this quantity is small. Identifying contexts a priori in which that will be the case is no mean feat. In principle, misspecification is most likely when the conduct regulated is especially heterogeneous. But this idea is extremely difficult to operationalize, since "heterogeneity" is not a self-defining or intrinsic concept, but takes meaning only from the regulatory context. If, for example, we decide that pilots' proclivity to suffer incapacitation is a function of their biological inheritance, or what they eat, drink, and breathe, then we might find the regulated population "heterogeneous." But if we decide that it is a function of stresses in their occupational environment, we would find the population "homogeneous."

The "scope" of a rule is one possible proxy for "heterogeneity." We would expect to encounter greater difficulty, for example, in defining "disability to perform any occupation" than in defining "disability to be a commercial pilot." But the difference may be merely one of effort, not degree of difficulty. A "larger" rule may take more effort to write, but the payoff from the effort will also be proportionally larger.

Another possible proxy for heterogeneity is rate of change over time. The more rapid the rate of change in either the regulated behavior or in human knowledge about that behavior, the greater is the risk that bright-line rules will freeze policy into undesirable patterns. For example, the Comptroller of the Currency has argued that bank chartering policy must be free to adjust to changes in the economic climate. Of course, a critic of the age-60 rule might argue that the supply of and demand for pilots can change just as rapidly as the economics of banking. But the FAA could reasonably respond that, whereas economic factors are central to the purposes of bank regulation, they are at best secondary to safety considerations in pilot licensing (and perhaps totally irrelevant). Still, the "rate of change" variable suffers from the same inherent subjectivity and policy-dependence as "homogeneity." Only in relatively extreme cases -- such as regulation of new technology -- is it likely to provide a very reliable guide to the policymaker.

In measuring incongruity losses, one must look at the consequences as well as the rate of "misspecification errors." A single error by the FDA in incorrectly licensing a harmful new drug (or, for that matter, excluding a life-saving new drug) should trouble us a great deal more than a thousand citations for harmless parking violations.

While none of the case studies in this report involves decisions having potential consequences as nightmarish as a Thalidomide disaster, the OCC and FCC studies do involve individual decisions with rather broad potential impacts. They illustrate the "lumpiness" of business licensing decisions generally: They make an all-or-nothing judgment about conduct potentially affecting a large number of market transactions. Although continuing supervision can reduce the risk of untoward consequences, their detection may come too late to prevent significant social harm. The pilot licensing (and de-licensing) decision has a similar quality.

At the other extreme, in our sample, are decisions like the HMTA penalty computation. In addition to involving relatively small sums of money, this decision involves a continuous range of possible outcomes. The penalty determination (as opposed to the liability determination) is not an all-or-nothing decision. The parole system operates in much the same fashion. Although the former Parole Board nominally made only "in-out" decisions in response to parole petitions, in practice the Board had a more continuous range of choices available, since denial usually took the form of a continuance to a presumptive future release date designated by the Board. In 1977, the Commission made this sytem more explicit and universal, by adopting the current practice of setting a presumptive future release date (contingent on good behavior) within 120 days from admission. In a system of continuous possible outcomes, the consequence of errors is not likely to be as great as in a system of binary choice.

Whatever the a priori magnitude and likelihood of misspecification errors -- difficult to estimate in most cases -- the case studies illustrate some useful techniques for confining these risks. The disability insurance rules, for example, use a sequential decision rule that tends to eliminate most of the "easy" cases (clearly disabled, clearly not disabled) whose erroneous resolution would involve the largest social cost, and confine most of the potential for misspecification error to the cases near the borderline. Even though a bright-line rule (like the grid) undoubtedly makes many misspecification errors in the remaining cases, the social costs of those errors, taken individually, is small. The Labor Department and Parole Board have used similar devices in structuring their rules.

VI. CONCLUSION

This study was premised upon the belief that empirical analysis of administrative rule precision is both feasible and fruitful. I believe that the results vindicate that belief. The case studies illuminate factors that explain variations among different rules, as well as changes over time in particular rules. Those factors provide a framework, in turn, against which the products of administrative draftsmanship can be evaluated from a normative perspective.

To say that rule precision is amenable to empirical study does not in any way belittle the difficulties inherent in the task. Measuring degree of rule precision and tracing its behavioral consequences present formidable conceptual and practical problems. Yet reasonable approximations can usually be made without insuperable effort. Even if one cannot calibrate the absolute precision of an individual rule, one can at least arrange alternative formulations in a rank order, or identify the general tendency of a proposed amendment. Similarly, even if one cannot quantify the costs and benefits of moving from one formulation to another, one can at least categorize the probable impacts and make qualitative estimates of their weight.

In assessing the various costs and benefits of clarifying administrative rules, several contextual variables emerged as particularly useful indicators. These include: the volume of transactions governed by the rule; the value of the interests typically at stake in those transactions; the sophistication and resourcefulness of the rule's audience; the formality of procedures provided for authoritative application of the rule; and the degree of decentralization in the enforcement process. The virtue of these indicators is that they can be fairly readily observed and qualitatively "measured," while at the same time serving as a reliable proxy for several categories of costs or benefits in our "precision calculus." Thus, for example, the volume of transactions governed by a rule is a good predictor of the payoff from rule clarification because it correlates well with: 1) the social cost of noncompliance, 2) the number of misapplication errors, 3) the level of future demand for case-by-case policy elaboration, and 4) the level of social investment in rule application. Similarly, the greater the degree of administrative decentralization, the greater is the potential for achieving savings by reducing the volume of quality control activities and misapplication errors. Clarifying rules that govern transactions affecting very large individual or social stakes, moreover, can significantly reduce evasion costs, litigation costs, and future ("ex post") rulemaking costs.

While these parameters can thus serve as useful signposts in the search for optimal precision, they do not, and cannot, substitute for morally sensitive judgment. An empirical analysis that focuses on measurable "costs" and "benefits" admittedly depreciates "soft" values that cannot readily be quantified. Most of us would maintain, I suppose, that basic values like fairness, dignity, or equity demand some threshold degree of verbal precision from any legal regime, irrespective of its measurable impact on error rates or transaction costs.

There may well be occasions when the results produced by a more explicitly deontological approach would diverge from those generated by a utilitarian one. Perhaps the parole case study stands as a reminder of that fact. But I suspect that those occasions will be rare. Mercenary as my approach may seem to some, variables like compliance rate and litigation cost usually do a pretty good job of mirroring intensity of participants' feelings (if not observers' feelings) about relative fairness or equity. Moreover, the empiricism utilized here--and likely to be utilized by any practitioner of the method--is sufficiently casual to accommodate a healthy dose of nonquantifiable values.

BACKGROUND REPORT FOR STATEMENT 10
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WHEN THE EXCEPTION BECOMES THE RULE: REGULATORY EQUITY AND THE FORMULATION OF ENERGY POLICY THROUGH AN EXCEPTIONS PROCESS

PETER H. SCHUCK*

Regulatory programs exacerbate the inherent conflict between the values associated with rules and with equity. This conflict is especially acute in programs, like petroleum price and allocation regulation, that regulate complex transactions between diverse firms in a volatile market. Professor Schuck examines one technique for achieving regulatory equity—an exceptions process—in that context. After exploring the different limitations of rules and the relationship between regulatory equity and related concepts, including discretion, judicial equity and agency adjudication, Professor Schuck presents four detailed case studies of the exceptions process in petroleum regulation. He demonstrates that the exceptions process did enhance regulatory equity in that program but also jeopardized important administrative law values.

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For almost a decade (and as recently as 1981), the Department of Energy (DOE) exceptions process—a process by which a person, firm or entity subject to a valid statutory or administrative rule is relieved from the legal obligation to comply with that rule because of the special features of the situation—was an extraordinarily important regulatory device. The DOE's Office of Hearings and Appeals (OHA),[1] which administered the exceptions process, routinely shifted hundreds of millions of dollars in cross-subsidies among refiners and made economic life-and-death decisions concerning thousands of business firms and local communities. With the official termination of price and allocation controls on January 21, 1981, the DOE shifted into low gear (some would say neutral) and legislative proposals were introduced to abolish or reorganize the Department.[2] Despite these developments, the DOE exceptions process is not simply a historical curiosity whose significance vanished with the lines at gas stations. It remains an innovation of singular interest to students of administrative process.

Even if the process were utterly moribund, it would be worth studying in its own right. OHA remains quite active. Its caseload, although well below the levels that prevailed during the motor gasoline crisis of 1979, continues to be substantial.[3] Moreover, some of its most controversial cases, involving large policy issues and enormous sums of money, are still pending.[4] Even if a reorganization of the DOE occurs, these pending cases will have to be resolved. It is also quite possible, perhaps even probable, that controls will be reimposed at some future date. So long as the United States economy continues to be vulnerable to shocks resulting from developments in the Middle East, future energy price controls cannot be ruled out.[5] Indeed, Iran's protracted war with Iraq raises the possibility of convulsive political changes and resulting shortages in international oil markets, developments that might lead to a new call for controls.

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[1] Unless otherwise indicated, subsequent references to the DOE or "the energy agency" may be taken to refer to its predecessor agencies, the Federal Energy Office (FEO) and the Federal Energy Administration (FEA), as well. Unless otherwise indicated, subsequent references to the OHA or "the exceptions office" may be taken to refer to its predecessor offices, the Office of Private Grievance and Redress (OPGR) and the Office of Exceptions and Appeals (OEA), as well.

[2] *See* J. Sellers, Decontrol and Regulatory Legitimacy: The Case of the Entitlements Program (unpublished manuscript, on file with author).

[3] The OHA's authorized staffing level for fiscal 1983 was 119, compared to 211 in 1980. Its budget for those years was $5.25 million and $5 million, respectively. Telephone interview with George Breznay, OHA Director, February 16, 1983.

[4] The "entitlements clean-up" problem, for example, may involve the disposition of as much as one billion dollars. The OHA has also been given responsibility for effecting billions of dollars in refunds resulting from past overcharges. *See* 48 Fed. Reg. 50,624 (Nov. 3, 1983) (proposing end to entitlements program).

[5] *See, e.g.,* CONGRESSIONAL RESEARCH SERVICE, WESTERN VULNERABILITY TO A DISRUPTION OF PERSIAN GULF OIL SUPPLIES: U.S. INTERESTS AND OPTIONS 78-82 (1983); ENERGY FUTURE: REPORT OF THE ENERGY PROJECT AT THE HARVARD BUSINESS SCHOOL 274-76 (R. Stobaugh & D. Yerkin eds. 1980); Akins, *Prospects of Supply Interruptions from OPEC in the Near Future*, in POLICIES FOR COPING WITH OIL-SUPPLY DISRUPTIONS 6-9 (G. Horwich & E. Mitchell eds. 1982).

The continuing concerns about regulatory rigidity and the demands for regulatory reform also make research on the exceptions process timely. Changes in administrative law and many proposals for reform increasingly favor policy development through rules and more formal, judicial-type rulemaking procedures. If those trends persist, as appears likely, administrative techniques will be needed that encourage flexible accommodations to diverse and complex conditions within an increasingly rule governed system. A properly structured exceptions process might address that need.

This article examines the pursuit of regulatory equity through an administrative "exceptions process." Such a process relieves a person, firm, or entity subject to a valid statutory or administrative rule from the legal obligation to comply with the rule. It does so by issuing a formal exception, waiver, or similar form of special relief from the rule's application based upon the special features of the applicant's situation.[6]

The article consists of four parts. Part I explores the tension between the conceptions of justice represented by rules and by equity, highlighting the ways in which this tension is expressed in a regulatory context. Part I concludes by posing broad questions about the exceptions process that the study will attempt to address. Part II examines the exceptions process in energy regulation through four case studies of exceptions decisionmaking at the DOE, as administered by the Office of Hearings and Appeals. Each case study illustrates certain themes or tendencies that seem endemic to an exceptions process of this kind. Drawing upon the case studies and other sources, Part III analyzes and evaluates the essential features of the DOE's exceptions process, concluding with a discussion of the exceptions process as a "safety valve." Part IV summarizes the study by offering tentative answers to the questions posed at the end of Part I.

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[6] Remarkably, the exceptions process has received scant scholarly attention. Apart from studies of the World War II price control program, *see, e.g.,* S. McMillen, Individual Price Adjustments under OPA: A Study in the Dynamics of Flexible Pricing (1949); V. Thompson, The Regulatory Process in OPA Rationing 339-43 (1950), it has been essentially ignored until very recently. The first systematic effort to analyze exceptions decisions as a distinctive form of administrative activity appeared in a 1982 article by Professor Alfred Aman. *See* Aman, *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 Duke L.J. 277 (1982); *see also* Comment, *The Exceptions Process: The Administrative Counterpart to a Court of Equity and the Dangers it Presents to the Rulemaking Process*, 30 Emory L.J. 1135 (1981). A purely descriptive discussion is Cockrell, *Federal Regulation of Energy: The Exceptions Process*, 7 Transp. L.J. 83 (1975). For a general account of economic controls that provides some insights into the problem, see R. Kagan, Regulatory Justice: Implementing a Wage-Price Freeze (1978).

It should be emphasized at the outset that this is a study of only one exceptions process and, as the reader shall see, a distinctive one at that. Such a study cannot generate clear implications for other exceptions processes in other agencies with other regulatory tasks, for the truth of any nontrivial generalization about the exceptions process cannot be shown to extend beyond the particular DOE example. Such is the awesome power of social science!

Nevertheless, an in-depth study of a particular administrative process can be valuable. It can support at least a qualitative appraisal of the variables important to the performance of that kind of process. It can highlight the relationships between the various elements of such a process, and the values implicated by those relationships. Even if such a study lacks unequivocal normative conclusions, it can still identify problem areas and suggest plausible approaches to reform. In the end, however, the chief argument in favor of detailed case studies of administrative process is that they are likely to be superior to the alternatives—conventional wisdom, unconventional intuition, and a methodological rigor and comprehensiveness that the subject matter does not permit.

I. Regulation and Equity

Federal agency rules that prescribe private conduct are, of course, ubiquitous techniques of social control. Although commonplace, however, they are also relatively novel. As recently as twenty years ago such rules were largely confined to the Internal Revenue Service and the independent regulatory commissions created during the New Deal era. But between 1970 and 1975, Congress established seven major new regulatory agencies and enacted more than 30 grants of broad regulatory authority.[7] Today, rules have joined grants-in-aid, taxes, subsidies, jawboning, and aggressive use of the media as instruments by which the federal government attempts to conform private behavior to declared public policies.

Although the proliferation of such rules began to slow in the late 1970's as regulatory reform efforts took hold, especially in 1981 when the Reagan Administration assumed power,[8] this may prove to be but a pause in a long-term tide of regulatory intervention. The growth of rules, after all, seems to reflect deep-seated changes in American society—far-reaching demographic and political shifts, a deepening awareness of ecological complexity, and fundamental economic, moral, and institutional transformations. Social goals that rules (and sometimes *only* rules) seem capable of achieving have become more salient. These goals include eliminating discrimination against vulnerable groups, perfecting markets, strengthening national cohesion and uniformity, redistributing wealth, and making policy more "rational" and predictable.[9]

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[7] *See* Lilley & Miller, *The New Social Regulation*, 47 Pub. Interest 49, 51 (1977).

[8] For a discussion of regulatory reform efforts in recent years, see, for example, R. Litan & W. Nordhaus, Reforming Federal Regulation (1983); Harter, Book Review, 67 Minn. L. Rev. 1065 (1983).

Rules increasingly dominate our collective life. They are the gears in the machinery of modern government. In principle, at least, rules are both instruments of power and brakes upon its exercise. They assist citizens in controlling the activist state because rules specify rights and facilitate remedies for violations. By particularizing citizens' duties, rules also enable the state to influence the conduct of citizens. And rules help both citizens and the state to conduct their affairs on the basis of some common, predictable assumptions concerning the norms and conditions that will prevail.

Rules, then, are necessary conditions of any fully developed, contemporary conception of a just administrative process. But they are not sufficient. Justice also demands that the rigor of rules be tempered by other considerations. So long as values exist that cannot readily be formulated as rules and anomalous cases arise that rules fail to anticipate, rules will constitute an incomplete technology of justice.[10] As the social domain in which rules govern expands, the occasions of such rule-based injustice will multiply, perhaps exponentially. In such situations, the infusion of equity into the regulatory process—what I shall refer to as "regulatory equity"[11]—will become an ever more vital component of the administrative process.

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[9] *See, e.g.,* Schuck, *The Politics of Regulation*, 90 YALE L.J. 702, 724-25 (1981). The strong emphasis upon rules and a legalistic approach to regulation, as distinguished from more flexible, cooperative methods, may be a distinctively American phenomenon. For some interesting international comparisons, see, for example, S. KELMAN, REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL SAFETY AND HEALTH POLICY (1981); Vogel, *Cooperative Regulation: Environmental Protection in Great Britain*, 72 PUB. INTEREST 88 (1983).

[10] Not all rules are equally problematic. The form and context of a rule, for example, affect the need for modulation in the interests of justice. Thus, in constitutional law, torts, and contracts, rules increasingly tend to be open-textured, indeterminate, and readily tailored to individual fact situations. In contrast, rules administered by regulatory agencies tend to be more determinate and specific. *Cf.* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1686-89 (1976)(distinguishing between "rules," which provide for certainty of results, and "standards," which, by emphasizing underlying policy objectives, allow a more precise result in some cases). Even in regulatory law, however, rules vary considerably along these and other formal dimensions. *See* Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

[11] Professor Alfred Aman, describing essentially the same phenomenon, has used the term "administrative equity." *See* Aman, *supra* note 6, at 280. Although the terms are functionally interchangeable because any administrative apparatus that applies rules must somehow deal with the claims of equity, I prefer to emphasize the regulatory dimension. This reflects my conviction that this problem is more acute and complex when the body of law that is being developed has

A. *The Limits of Rules.*

That rules cannot fully achieve justice is an ancient theme in legal theory. Aristotle distinguished between "legal" justice, based upon general rules, and "equity," which corrects what is merely legally just.[12] That distinction has been reflected in many important institutional and doctrinal developments. Examples include the equitable jurisdiction of courts; the evolution of many rigid common law rules into more flexible standards, such as "reasonableness," in which equity is "built-in";[13] and the open-ended, indeterminate standards contained in much modern legislation.

Regimes of rules and of equity are based upon fundamentally different conceptions of justice; each conception, taken alone, is radically incomplete. The regime of rules is general and prescriptive. It requires at a minimum that a decisionmaker accurately apply general, clearly articulated norms to fairly established facts. In contrast, the regime of equity is specific and ad hoc. It requires that any such norms be subordinated to an overriding standard of contextual fairness—that is, fairness to individuals in light of their particularized situations. Rules respond to the gravitational pulls of backward-looking precedent, forward-looking policy, or outward-looking analogies and notions of legal equality. Equity resonates to the inward-looking concerns of the immediate, to the riveting force of the particular, the situational. Those who value rules emphasize the need for commonality, regularity, continuity, and order. Those who esteem equity stress the importance of individuality (we are unique), spontaneity (we are not bound by the past), responsiveness (our needs change), and freedom (our course is not predetermined). Whereas rules exalt formal categories, equity is profoundly suspicious of abstraction and seeks to free diversity from the delusive discipline of order. Equity speaks not to the typical case—indeed, it may even deny that such a thing exists—but rather to the exotic, the unexpected, the exigent. Its distinctive techniques are neither comprehensive vision, synoptic analysis, nor disembodied principle, but sound judgment, contextual analysis, and an intuitive "feel" for what is fair under the circumstances.

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crucial competitive market implications, and especially when the agency actually supervises an industry, than it is when the administrative context lacks one or both of these features, as in the Social Security program.

[12] ARISTOTLE, NICHOMACHEAN ETHICS, V.10.1137-38 (W.D. Ross trans. 1915).

[13] *See, e.g.,* Kennedy, *supra* note 10, at 1685, 1686-89.

Rules glorify precisely those technocratic values—predictability, stability, uniformity, and control—about which equity is most skeptical; they systematically overlook or override certain particularities of time, place, and context. Our sense of justice, however, often demands that these particularities receive greater recognition and weight than rules ordinarily accord them. We can readily imagine sets of facts that come well within a rule's terms yet seem to call for a different disposition. When such an instance occurs, justice seems to call for suspending the rule in that case, without necessarily calling its general validity into question. Equity, too, entails certain risks, but they are the risks of uncertainty, irrationality, favoritism, diversity, and incoherence—precisely those that an increasingly rationalistic, centralized, control-oriented society wishes to minimize. The tension in our law between rule and equity, then, can never be eliminated. It will persist, as Thurman Arnold noted, "[s]o long as men require a moral and logical ideal to satisfy their impulses toward mercy and common sense."[14] The quest for regulatory equity is a search for an appropriate means to harmonize these eternally conflicting values.

Any complex system of rules that aspires to justice must make some provision for regulatory equity. Although classes of cases always exist in which rules create injustice, this does not explain what it is about a case that places it within those classes. It fails to reveal which characteristics demand that the rule be suspended rather than applied, and which reasons or motives make an appeal to equity seem appropriate. The following discussion attempts to provide that explanation.

The limits of rules define the boundaries of regulatory equity. Broadly speaking, three general categories of conditions or reasons may mark those limits. The need for regulatory equity may derive from certain features of the rule itself, from the institutional context in which the rule is developed and applied, and from situational needs of the decisionmaker that may have nothing to do with the rule's own features or context.

1. *The Character of Rules.* Like any structure for deciding particular cases, a regime of rules necessarily dispenses imperfect justice—imperfect in the sense that decisions derived from it must reflect whatever limitations rules possess *qua* rules. This discussion addresses four potential limiting features: form, knowledge, comprehensiveness, and articulation. Every rule has at least some limitations. These may often be reduced (at some cost) but can never be wholly eliminated, for

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[14] T. Arnold, The Symbols of Government 62 (1935).

they inhere either in the nature of rules or in the complexity of reality. Insofar as these limitations remain, perfect justice solely through a regime of rules is unattainable.

(a) *Limitations of form.* Three formal attributes of a rule determine the extent to which it can achieve its purposes without equity's assistance: its generality (the number of cases to which it is meant to apply), its transparency (the degree to which it evokes uniform interpretations in different minds),[15] and the number of unweighted factors that it makes relevant to its application. These attributes are empirically as well as analytically distinct. For example, a very general rule may have ambiguous language and prescribe multiple unweighted factors. As the twenty-sixth amendment demonstrates,[16] however, a rule need not have either of these attributes.

The ancients recognized that rules' formal imperfections can cause injustice. Aristotle maintained, for example, that the law could not achieve true justice in part because it "takes the usual case."[17] But the relationship between the form of rules and the content of justice is more intricate than this categorical statement suggests. Judges seldom take "the usual case," preferring instead to formulate the narrowest rule that can connect the facts of a dispute to some source of decisional legitimacy, such as a precedent, statute, constitution, or "natural right." The level of generality at which legislators and regulators frame rules is often a matter of conscious policy choice; it is influenced by the significance they accord to predictability, equal treatment, flexibility, incremental policy development, and other values in a particular context.[18]

Transparency and the number of unweighted decision factors also affect a rule's efficacy. A rule may be so opaque, or may enumerate so many unweighted factors, that it cannot generate reasonably predictable outcomes. As Aristotle wrote, "when the thing is indefinite the rule also is indefinite."[19] A rule that "undesirable behavior" is tortious, for example, would afford no hint as to what conduct might be actionable, even if one could predict with confidence how cases at the extremes (e.g., murder, marriage) would be decided. Such a provision fails to perform even minimally those functions—bounding administrative discretion, predictability, encouraging equal treatment, facilitating legislative and judicial review—that constitute rules' distinctive contribution to a just legal regime.

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[15] For a discussion of this attribute, see Diver, *supra* note 10, at 67.

[16] U.S. CONST. amend. XXVI, § 1 ("The right of citizens . . . who are eighteen years of age or older, to vote shall not be denied . . . on account of age.").

[17] ARISTOTLE, *supra* note 12, at V.10.1137a.

[18] For a discussion of many of these factors, see Diver, *supra* note 10, at 67, and ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, STATEMENT ON GUIDELINES FOR CHOOSING THE APPROPRIATE LEVEL OF AGENCY POLICY ARTICULATION, 1 CFR § 310.9 (1984).

[19] ARISTOTLE, *supra* note 12, at V.10.1137b.

A rule that is too transparent may also be unable to attain its purpose. Consider the following example: "If a Ford strikes a Buick on July 16, 1985, the driver of the Ford shall pay $100 to the driver of the Buick." This rule is stunningly determinate, indeed so much so that it may well deny due process or equal protection by practically assuring that virtually identical driving behavior will have very different legal consequences, depending upon happenstance.[20]

Any given rule, then, expresses an inescapable tension between the virtues and vices of each of its formal elements. A more general rule controls more cases but only by subjecting more diverse phenomena to its homogenizing prescriptions. A vaguer, more ambiguous rule permits greater flexibility in adapting to new or unanticipated conditions but only by reducing the predictability and uniformity of outcomes. A multifactored rule, especially one that fails to weight the factors, enriches the administrator's ability to discriminate among complex phenomena but diminishes the rulemaker's (or reviewing court's) control over particular decisions. Regulators can only transcend these limitations by looking beyond the regime of rules to the ethos of equity.

(b) *Limitations of knowledge.* We are extraordinarily ignorant of the intricate web of cause, consequence, and circumstance in which our intentions and actions are shaped and executed. But however little we know of the world as it is, we know even less of the world that will be. A regime of rules, of course, is directed to the future. To Aristotle, equity meant deciding cases as the "legislator himself would have said had he been present, and would have put into his law if he had known."[21] In this view, when cases arise that the rule did not envision and to which it cannot justly be applied, equity must effect what the rulemaker's want of prescience makes necessary; it must suspend or reformulate the rule (Aristotle does not indicate which) to achieve a just outcome in the unforeseen case.

This notion of the relationship between imperfect knowledge and equity seems quite incomplete, at least in the regulatory context. Imagine a perfectly prescient rulemaker. She fully comprehends the implications of all rules that she might issue, foresees all changes that might occur, and anticipates all cases that may arise in the future. Is it clear, as Aristotle implies, that this clairvoyant seer would formulate a rule resolving in advance all cases yet to come? And if she would, would this achieve perfect prescriptive justice, rendering equity superfluous? The answer to both questions, it would seem, is no. She might believe, for example, that by framing a rule today that will anticipate and correctly decide tomorrow's case, she would incur unacceptable political costs in attempting to persuade others to accept that rule. She might therefore prefer to proceed incrementally, issuing a more limited but noncontroversial rule now and deferring the resolution of future cases to a later day. If she also faced high information costs in formulating a rule capable of fully anticipating the future, she might find an incremental strategy even more attractive.

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[20] The transparency of certain rules renders them constitutionally invalid for somewhat different reasons. *See* Woodson v. North Carolina, 428 U.S. 280, 302-05 (1976)(mandatory capital punishment statute).

[21] ARISTOTLE, *supra* note 12, at V.10.1137b.

Aristotle also seems to have been wholly concerned with rules formulated by rulemakers who not only are ignorant of the future but also proceed as if they were *unaware* of their ignorance. Yet some rulemakers *are* aware of their ignorance and guard against it in fashioning rules. Both kinds of rules demonstrate the need for regulatory equity, but each implies somewhat different responses to that need. Unanticipated ignorance, of course, is commonplace; we seldom know precisely what we don't know. Attempting to resolve unforeseen cases through rules never designed to apply to them will lead to harsh, absurd outcomes unless equity can palliate them. Of course, rulemakers who are unaware of their own ignorance may not perceive the contingent need for regulatory equity, much less provide an institutional means to achieve it. They may still pursue equity, but will not ensure that certain mechanisms for attaining it are available.

Ignorance of the future can often be anticipated and its most deleterious effects blunted. Even if regulators cannot map the future in detail, they can sometimes discern the broad contours of contingency that must be faced and design rules to conform to that dimly perceived topography. Suppose, for example, that an official must regulate a rapidly evolving technology, such as telecommunications. She knows or strongly suspects that the activity will present a very different face in twenty years than it does today. She anticipates that technology, industry structure, market conditions, and consumer preferences will change significantly but she cannot predict with confidence the precise nature of those changes. Unwilling to rely upon highly speculative forecasts, but aware of the uncertainty problem, she has several options. She may decide to proceed incrementally, eschewing rules in favor of policymaking through case-by-case adjudication. She may instead promulgate rules containing vague language or multiple, unweighted decision criteria, thereby preserving flexibility for the volatile future. Alternatively, she may devise a more determinate rule to govern what she thinks the future will bring but create an auxiliary administrative process that can provide equitable relief from the rule whenever appropriate. Each of these approaches recognizes the substantial claims that equity may assert against an uncertain future.

(c) *Limitations of comprehensiveness.* A rule does not always govern autonomously, even within its well-defined boundaries. Dominion over its subjects may be hotly contested. Professor Dworkin illuminates this point by distinguishing between rules, policies, and principles.[22] Although developed for an altogether different purpose, Dworkin's distinction nevertheless suggests several ways in which noncomprehehsive rules may demand regulatory equity. For Dworkin, a rule is a standard that is absolute, "applicable in an all-or-nothing fashion";[23] it prescribes a particular result if the particular facts that it stipulates are present. A principle, however, is a standard that asserts a requirement of morality; it does not prescribe a particular outcome but merely "states a reason that argues in one direction."[24] Its reach depends upon its weight or importance. In contrast, each rule has equal weight, at least for purposes of resolving conflicts between them.[25] Finally, a "policy" is a standard that sets a social goal to be pursued.[26]

Rules, principles, and policies often compete to influence or control the outcome of administrative decisions. First, the sheer volume of rules promulgated and administered by an agency increases the risk that any rule that seems to cover a particular set of facts will encounter another rule with its own plausible claim of coverage. The agency, of course, can resolve such a conflict, but only on the basis of some *other* ground of decision. Second, policy is really an amalgam of conflicting policies (in Dworkin's sense of the term) that reflect its multiple statutory objectives, its diffuse political constituencies, and the programmatic and administrative realities within which it must work. A rule, then, may not only contradict other rules but also conflict with policies not fully embodied in rules, policies as firmly within the agency's charge as those that underlie that rule. Here, too, only some overriding criterion—whether a rule, principle or policy—can ultimately resolve such conflicts. Finally, an agency's rules are part of a continuing, intense conversation with the legislature, courts, and society at large concerning the scope and meaning of the agency's purposes and methods. That conversation leads to appropriate accommodation of rules and equity and clarifies the values that each represents.[27]

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[22] R. DWORKIN, TAKING RIGHTS SERIOUSLY 24-78 (1977).

[23] *Id.* at 24.

[24] *Id.* at 26.

[25] *Id.* at 23-26, 73-78.

[26] *Id.* at 22.

Threats to the comprehensiveness and autonomy of an agency's rules, consequently, come from several quarters—from conflicts between rules, from policies and principles that exemplify other values, and from other institutions. These sources of tension reflect moral, administrative, and political imperatives to which an agency must somehow respond. For example, when the Occupational Safety and Health Administration is challenged to justify an occupational safety standard that imposes heavy costs upon regulated firms, it cannot simply point to its broad statutory authority to develop rules that minimize risks to workers. Even before an agency promulgates a statutorily authorized rule, it must take account of competing policies (e.g., the objective of maintaining a viable industrial sector) and competing principles (e.g., a worker's health is not protected if her employer is forced out of business).[28] Equity is one integrating technique.

(d) *Limitations of articulation.* In our legal culture, the legitimacy of a rule—and perhaps its validity as well—ordinarily requires that the reasons adduced in its support be justified in terms of some preexisting, appropriate premise of decision, some rule or principle whose generality, by transcending the particular case, avoids the risks of arbitrariness inherent in ad hoc decisionmaking. It is not sufficient that the decisionmaker either flips a fair coin[29] or admires one of the parties.

The norm that legal decisions should be reduced to writing[30] is designed in part to secure and reinforce this rational element of legitimacy. The obligation to render a written decision subjects one to an intellectual discipline, a public process of justification, in which one must struggle to link rules, principles, evidence, inference, and logic into a chain of reasoning that can command general respect. But although the articulation of reasons grounded in general rules is a noble aspiration of our legal system, many regulatory decisions fail to fulfill it.[31] The norm of reason-giving is not nearly as well-established for regulators as for judges. Agencies sometimes provide reasons when they are not legally obligated to do so, but their articulation is often cursory, conclusory, and of little use to one seeking to evaluate a decision's substantive rationality.

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[27] Duncan Kennedy, using different but somewhat analogous categories, suggests that the introduction of equity (what he calls "standards") into a rule-dominated system may be a way of seeming to humanize an unjust system of law or, alternatively, a way of weakening the hold of such a system, "keeping alive resistance in spite of the capture of the substantive order by the enemy." Kennedy, *supra* note 10, at 1777.

[28] *See, e.g.,* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 646-51 (1980).

[29] *See* N.Y. Times, May 29, 1982, at 25, col. 6.

[30] *See, e.g.,* F. COFFIN, THE WAYS OF A JUDGE 57-58 (1980).

There are many situations in which an agency *could* rationalize particular regulatory outcomes in terms of a general rule, but does not. Numerous routine, noncontroversial decisions, such as contract or grant awards, are largely discretionary. Although the lack of standards in such cases does not wholly eliminate the value of giving reasons, it does obviate most of its advantages. This is because giving reasons, if more than a desultory gesture, consumes scarce time and personnel; for some regulatory decisions, these process costs would exceed the value of such benefits as reducing errors, increasing acceptance of adverse decisions, and facilitating review of decisions.

Although the law often *permits* decisionmakers to refrain from providing reasons, the nature of certain decisions may actually *preclude* them from doing so. Several situations illustrate this predicament. First, an administrator may apply a clear and indeterminate rule and reach a decision that seems justified, though not required, and yet be unable to elucidate precisely how she reasoned from the one to the other. Either because a governing norm requires it or because complex policy considerations demand it, the administrator may feel obliged to take many unweighted factors into account. Here, the reasons that support the ultimate decision would include at least an explanation of each factor, an assessment of the decision's empirical relationship to the real world, and a description of the implicit weighting scheme by which the agency integrated the factors into a decision. In principle, the decisionmaker could reconstruct her mental operations, make them explicit, and place them on public view so that the elements of her decision can be scrutinized and evaluated. In practice, however, she probably could not identify, much less articulate, all of those elements, either to herself or to others.[32]

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[31] The Administrative Procedure Act (APA) requires an agency to give reasons only in connection with formal rulemakings or formal adjudications, 5 U.S.C. §§ 556-557 (1982), which account for relatively few agency decisions. In the large, increasingly important category of informal rulemaking, the final rule need only "incorporate . . . a concise general statement of [its] basis and purpose." 5 U.S.C. § 553(c) (1982). That statement, of course, must be sufficiently specific and complete to enable effective judicial review of the decision. Some appellate courts have interpreted this requirement to mean a fairly detailed justification of rules. *See, e.g.*, Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850 (D.C. Cir. 1972). *See generally* Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975). Still, the requirement was not intended to duplicate the rigor of judicial reason-giving and reviewing courts have tended to demand somewhat less in the way of agency articulation. *See, e.g.*, Kenworth Trucks v. NLRB, 580 F.2d 55, 58-59 (3d Cir. 1978). *But see* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2866 (1983). For informal adjudications, which comprise the vast majority of agency decisions, the APA imposes no procedural requirements at all, much less an obligation to articulate reasons. Many commentators have deplored this lacuna. *See* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 524-30 (1979).

In the situations described above decisionmakers can in principle base their decisions on identifiable general rules. In other situations, however, decisionmakers cannot devise a general rule from which to derive and rationalize decisions. To put the point another way, there are decisions the justice or correctness of which cannot intelligibly be measured by their consistency with a rule. Professionals frequently make decisions of this kind. Physicians, for example, must sometimes diagnose illness or prescribe therapies without being able to anchor those decisions in a general rule or principle, yet they feel confident that they are correct and that professional colleagues would do likewise. Experienced social workers or lawyers sometimes encounter problems that do not fit readily within conventional categories, yet they will often devise particular solutions that seem "just," "appropriate," or simply "feel right."

Decisions of this kind can arise for two reasons. First, certain decisions require a high degree of specialized judgment and are virtually immune from any nonprocedural, objectively verifiable criticism. The central ingredient of such decisions—an idiosyncratic, intuitive, essentially subjective apprehension of reality—is inaccessible, indeed antithetical, to generalization. Second, certain decisions are designed to be wholly discretionary. They do not necessarily require ineffable or intuitive judgment; indeed, it may be perfectly possible to specify the controlling factors in the form of a general rule. Wholly discretionary decisions perform a social function they could not perform if they were systematized and regularized by rules. They are auxiliary components of a complex administrative system whose routine activities—here, the application of rules to particular facts—generate pressures that threaten the system's continuing viability or integrity. These pressures may include dissatisfaction with the rule's policy, perceived inequities in the rule's initial application, changes in circumstances, and the like. When such pressures exceed the level that the system is designed to tolerate, the wholly discretionary decision comes into play. Like a safety valve in a mechanical system, discretion relieves pressure by assuming some of the system's functions and altering how it performs others.

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[32] Reasoning from complex, multifactor premises to a decision is probably more cybernetic and heuristic than formally rational and synoptic. *See generally* J. STEINBRUNER, THE CYBERNETIC THEORY OF DECISION: NEW DIMENSIONS OF POLITICAL ANALYSIS (1974). If one could specify the factors of decision, how they relate to one another and to the real world, the contingencies that bring them into play, and the weight to be applied to each, then one could actually devise a computer program that would yield a decision accurately reflecting those decision ingredients. But to infer or "post-dict" from a complex decision to the ingredients that produced it is a very different matter. In such cases, the reasons decisionmakers articulate cannot fully or accurately reveal the grounds for their decision. Our brains can perform far more complex tasks of integration than we are capable of recapturing and verbalizing. As Polanyi put it, "we can know more than we can tell." *See* M. POLANYI, THE TACIT DIMENSION 4 (1966); *see also* D. SCHON, THE REFLECTIVE PRACTITIONER viii (1983).

The pardoning power, deployed through executive clemency, dramatically exemplifies this safety valve function. This power is plenary, exercised without any governing or even constraining standards.[33] Pardoning decisions are not "intuitive" as that term is generally used; their standardlessness is not inherent in the kinds of judgments demanded by pardoning decisions. Such decisions *could*, both in principle and in practice, be regulated by rules. Criminal sentencing and parole decisions, for example, which do not demand fundamentally different kinds of judgments than pardoning decisions, are sometimes constrained by substantive rules.[34] Arguably, rules would make executive clemency more predictable, accurate, visible, and rational than its present, wholly discretionary character permits.

But structuring the pardoning power through rules would impair its ability to give justice individual form and to soften the remaining rigidities of an already discretionary criminal process. To do so would not merely alter outcomes (for better or for worse) but would fundamentally change the nature of the pardon decision, undermining its very raison d'etre. Executive clemency, after all, is not designed to enhance horizontal equity among prisoners or to yield predictable decisions. It seeks extraordinary justice in particular cases, not ordinary justice in the general run of cases. Far from generating expectations in prisoners, executive clemency decisions are socially valued precisely because they deny the legitimacy of such expectations.[35] An exercise of clemency is an expression of mercy, an act of grace, an acknowledgement of the insufficiency of rules. It cannot be transformed into its opposite without abandoning its distinctive claim to advance a radically different conception of justice.

Wholly discretionary decisions obviously risk favoritism, arbitrariness, and abuse, conditions inimical to the rule of law. Moreover, their standardlessness renders review by superior authority very difficult. Therefore, wholly discretionary decisions are usually confined to situations in which those risks are minimal; they affect persons whose status is already so degraded that an unfavorable decision will leave them little or no worse off than if no such decision process had been available at all.[36] This "what do I have to lose?" condition is notably absent in conventional regulatory schemes, where predictability and the protection of property rights and expectations are especially important values.[37]

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[33] *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 140-42 (1871). *But see* Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889, 905-11 (1981).

[34] *See* Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562-72 (1981).

[35] For a discussion of a related issue, see Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465-67 (1980)(fact that a state board of pardons has granted approximately three-quarters of the applications for commutation of life sentences does not create an entitlement so as to require the Board to justify its denial of such an application).

2. *The Institutional Context of Rules.* A regime of rules is embedded in a set of institutional arrangements through which general prescriptions are developed, promulgated, applied, evaluated, and perhaps modified. The ability of such a regime to achieve justice without recourse to equity depends upon the institutions charged with performing these rule-sustaining functions. Because certain institutions are especially hospitable to rule-based justice and others to equity, the legal system can affect how equitable considerations shape a rule's application by entrusting it to the ministrations of one kind of institution rather than another.

The organization, ideology and operating procedures of common law courts, especially those engaged in private adjudication, encourage judges to be more preoccupied with the interests of particular litigants than with those of the larger society. Regulatory agencies, however, tend to weigh policy and programmatic considerations more heavily, even when they adjudicate.[38] As Part II will demonstrate, this distinction reflects differences in the institutional purposes, types of rules, decision procedures, and organizational forms and settings of courts and agencies.

Legislatures present a somewhat more complex pattern. Their most characteristic output, the public bill, ordinarily takes the form of a general rule. This is not surprising. Generality not only minimizes the risk and appearance of legislative favoritism but also captures substantial "economies of scale" in legislative production. Legislatures, however, have also established specialized organs to dispense particularistic justice. Private bills, which typically prescribe results intended for only one or a small number of beneficiaries, are ordinarily processed under unique procedures.[39] Public bills, of course, are sometimes drafted to achieve decidedly particularistic results—for example, so called "Christmas tree" tax amendments designed to benefit one or relatively few companies. Even there, however, special procedures are needed to minimize abuse.[40]

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[36] The power of a jury to acquit the accused in a criminal case is another example. *See* M. Kadish & S. Kadish, Discretion to Disobey: A Study of Lawful Departures from Legal Rules 47-50 (1973).

[37] In conventional regulatory schemes, treating A "differently" than B may create highly visible competitive distortions and disadvantages, not only creating unfairness but undermining the agency's programmatic goals. But even there, what is being regulated may be so complex and variable that rules alone cannot assure desired outcomes. In such cases, substantially, if not wholly, discretionary decisions may be necessary.

[38] *Cf.* G. Calabresi & P. Bobbit, Tragic Choices, 71-72 (1978)("The reasons for using adopted aresponsible agencies to make tragic choices may be traced . . . to the desire to make the grounds for decision less direct and perhaps even less obvious, while at the same time trying to make sure that the decisions are based on broadly held social values.").

The relationship between different conceptions of justice and the institutions created to implement them is not simply a matter for institutional designers in the legislative and executive branches. Courts also influence this relationship, most notably by elaborating a common law of administrative process designed to render agency decisionmaking more regularized, generalized, visible, and susceptible to judicial scrutiny and control.[41] To facilitate judicial review, for example, courts have encouraged agencies to use rules. This, in turn, increases the need for regulatory equity to supplement and refine those rules. On the other hand, when adjudicating in a common law mode, courts tend to avoid rule-like decisions that might constrain their future flexibility.

3. *The Situational Needs of Rulemakers.* Both the inherent imperfections of rules and the particular institutional settings in which they are developed and applied may create lacunae in the structure of regulatory justice that only equity can fill. But not all demands for equity are so systematic. Some are ad hoc, reflecting the incentives that confront particular rulemakers in particular circumstances. Two of these circumstances are particularly important: the need to win political support for agency decisions and the need to process a large volume of cases with scarce administrative resources.

An official may wish to issue or enforce a rule that is politically controversial. In order to mobilize sufficient support for the rule, she may need to satisfy potential opponents either that it will not apply to them or, in the event that it does, that they will not be adversely affected by it. For a number of reasons, the rule may need to be quite general in form; hence, it may be impossible to allay the concern of potential opponents. In such situations, the official may couple the rule with some equitable process by which those adversely affected can hope to obtain relief from its burdens.[42] Moreover, by assuring that a rule will not preclude consideration of special factors that may arise, such a process may also make the rule easier to defend in court.[43]

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[39] *See* P. Schuck, The Judiciary Committees 242-65 (1975).

[40] *See, e.g.,* W.H. Brown, Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 398, 96th Cong., 2d Sess. 492-508 (1981); J. Sapp, Senate Manual, S. Doc. No. 1, 96th Cong., 1st Sess. 13-14 (1979).

[41] This judicial ambition persists even in the face of rather clear congressional intent to preclude judicial review. *See, e.g.,* Johnson v. Robison, 415 U.S. 361, 366-74 (1974). Even when the courts have acquiesced in a statutory preclusion of review, they have stressed the agency's unique institutional competence to make the equitable, situation-specific decisions that the legislature desires. *See, e.g.,* Hahn v. Gottlieb, 430 F.2d 1243, 1249-51 (1st Cir. 1970).

Regulatory equity can also be a tactical response to the reality of scarce administrative resources. The time, personnel, and budget required to enforce broad rules on a case-by-case basis may be extremely costly and the resulting benefits meager. Nonetheless, officials may want the rule on the books where it can encourage some voluntary compliance and project a coherent regulatory posture. Under those circumstances, they may be inclined to retain the rule but grant relief to classes of the regulated, such as small firms, if that will conserve administrative resources without undermining the actual or perceived integrity and viability of the regulatory program as a whole.[44]

B. *Regulatory Equity and Discretion.*

There is an intimate relationship between regulatory equity, in the sense in which that concept is used here, and discretion. Discretion, according to its chief expositor, Professor Kenneth Davis, exists "whenever the effective limits on [an official's] power leave him free to make a choice among possible courses of action or inaction."[45] An equitable standard, by its very nature, creates some discretion in the official who applies it; a number of different outcomes will be consistent with that standard. Discretion, therefore, affords decisionmakers leeway within which they can give equitable considerations some weight when they apply a rule.

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[42] The existence of such a process can mollify not only those to whom the rule may apply but also their political patrons in Congress and the executive branch. *See infra* notes 422-23 and accompanying text.

[43] Many court decisions during the 1970's, for example, invalidated overbroad administrative rules that created "irrebuttable presumptions." For a general discussion of these cases, see J. MASHAW, DUE PROCESS AND ITS DISCONTENTS (forthcoming); *see also* FCC v. WNCN Listeners Guild, 450 U.S. 582, 610 n.12 (1981) (Marshall, J., dissenting), and cases there cited; Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 405 n.62 (1981), and cases there cited.

[44] For example, the Nuclear Regulatory Commission exempts from its program for licensing special nuclear materials those licensees that have less than specified quantities of such material. Domestic Licensing of Special Nuclear Materials, 10 C.F.R. §§ 71.7-.10 (1982).

In his study of the wartime Office of Price Administration, Victor Thompson found that exceptions appealed to harried administrators for other reasons as well. First, administrators sometimes wished to grant an applicant relief but feared that doing so by rule would open the floodgates. Because exceptions had relatively low public visibility, they hoped to grant the most pressing applications without encouraging others to claim similar treatment. Exceptions also avoided the need to issue narrow-gauged rules that might seem arbitrary and politically motivated. OPA regulators, Thompson found, wished to keep the rules general and "pure." They had an "abhorrence of a rule governing a very small group, especially a named group, in the regulations"; they had fewer qualms, however, if the same group was named in an exception order. V. THOMPSON, THE REGULATORY PROCESS IN OPA RATIONING 342 (1950).

[45] K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 4 (1969).

But regulatory equity and discretion are by no means identical concepts. Regulatory equity is an objective or goal of the legal system, while discretion is a legal form or technique, a means to that end. Discretion is necessary to achieve regulatory equity but it is not an end in itself. The relationship between discretion and regulatory equity is revealed in the different techniques through which regulatory decisions can assimilate equitable considerations, the role of discretion in each of those regulatory techniques, and its somewhat different role in an exceptions process.

First, regulatory equity may be achieved through *rule formulation*. A rule can be written to include equitable standards, such as "reasonableness," that invite situation-specific judgments when it is applied. A rule can also be fine-grained, dividing the regulated population into a large number of discrete categories each of which is treated differently.[46] An existing rule, of course, can also be reformulated or repealed so that it no longer applies to situations that experience has shown to deserve special treatment.

Second, regulatory equity may, within certain limits, be achieved through *rule interpretation*. Thus, an agency that has occasion to decide what a rule means or to whom it applies can take equitable considerations into account when it renders that decision. In stressing certain facts rather than others or in manipulating the level of generality at which elements of the rule are to be pitched, for example, the agency enjoys considerable latitude about whether to include or to exclude particular parties. Certain regulatory methods facilitate this individualization of rules through interpretation. For example, the requirement that a license or permit be obtained before a particular activity is undertaken is often designed to allow situational factors to be incorporated into the decision as to whether and under what conditions the license or permit should be granted.[47]

Third, regulatory equity can be introduced through *rule enforcement*. This is not quite the same as rule interpretation. Even in situations in which the language and purpose of the rule may be perfectly clear and may be unambigously applicable to a particular firm or person, agency officials may consider situational factors in deciding whether, when, and in what manner to enforce the rule against a particular violator.

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[46] Under the Natural Gas Policy Act of 1978, for example, natural gas is divided into more than ten categories, each of which is entitled to separate price treatment. 15 U.S.C. §§ 3312-3348 (1982).

[47] *See* Federal Water Pollution Control Act, 33 U.S.C. § 1311(b)(2)(A) (1976), Regulations at 40 C.F.R. § 125.30(a) (1982)(the permits required under the federal Clean Water Act).

Finally, regulatory equity can be introduced by creating a *formal exceptions process* for the explicit purpose of considering applications for relief from particular rules. Whether the relief that this process grants is described as an exception, waiver, special relief, variance, or exemption, the technique is essentially the same. An exceptions process, as we shall see, also employs rule formulation, rule interpretation, and rule enforcement techniques in performing its tasks.

Discretion plays an essential but distinctive role in each of these regulatory equity techniques. When a rule is formulated, discretion may be implanted in the standards contained in it. The role of discretion in rule interpretation is often more ambiguous and only implicit. The official interpreting the rule, for example, may not be willing to acknowledge, indeed may not be aware, that she is making certain choices, such as selection of the relevant facts, that neither precedent nor logic strictly compels. Decisions as to which rules to enforce and against whom obviously require that discretion be exercised, but that discretion may be quite separate from whatever discretion is contained in the formulation or interpretation of the rule itself. The latter may be perfectly transparent and nonproblematic. Indeed, prosecutorial discretion is often governed by factors, such as resource constraints and compliance patterns, that have nothing to do with the rule's meaning.

In a formal exceptions process, discretion plays yet another role. There, the process itself assumes that the rule, as formulated and interpreted, does apply to a particular situation and presumably will be enforced as such. In that context, discretion does not operate upon the rule but is only invoked to determine whether that situation qualifies for special dispensation under the legal standards governing exceptions relief.

It is tempting to view this as a distinction without a difference, to conclude that the use of discretion in the exceptions process simply effects a reformulation, reinterpretation, or nonenforcement of the rule. This view, however, ignores several important points. The first concerns the moral meaning of rules. It is one thing to say that a rule does not apply to A, and quite another to say that the rule does apply to A but will be suspended in A's case for certain equitable reasons. In the first case, A's conduct (and that of others similarly situated) is being justified rather than condemned. The moral content of the rule, therefore, is being altered. In the second case, however, the moral content of the rule is affirmed; it continues to condemn the proscribed *conduct* but excuses A from *liability or stigma* on the basis of circumstances peculiar to A as an individual (and others similarly situated).[48]

A second distinction between discretion that acts directly upon a rule and discretion that is used in an exceptions process to decide whether relief from a concededly applicable rule should be granted, relates to the institutional structure within which the decisions are made. An explicit exceptions process, where one exists,[49] can assume many different organizational forms. This article is principally concerned with only one, in which an agency establishes an exceptions office that is to some extent structurally separate and independent from the program office that issues and administers the rules from which relief is sought.[50] This kind of structural separation of rule and equity may express not only a fundamental psychological ambivalence about the values that each embodies but also a principle of organizational function.[51] As we shall see, this separation also has important policy consequences,[52] and thus applying discretion to the exceptions process rather than to the rule has important practical effects as well.

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[48] For a discussion of the distinction between justification and excuse, see Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 557-64 (1972).

[49] Some agencies have no explicit exceptions process at all. Examples include the National Labor Relations Board and the International Trade Commission. *See* Letters to Hon. Loren A. Smith, Chairman, Administrative Conference of the United States, from Hugh L. Reilly, Solicitor, NLRB, June 21, 1983, and from Alfred Eckes, Chairman, ITC, June 8, 1983. In such cases, relief from a rule may be obtained, if at all, only by petitioning the agency to repeal or modify the rule, *see* Administrative Procedure Act, 5 U.S.C. § 553(e) (1982), or by successfully resisting its enforcement administratively or in the courts.

[50] In the federal government, another common form of exceptions procedure involves a hearing at some point in the exceptions application process before an independent administrative law judge. In such systems, appeals from grants or denials (or both) by the ALJ may ultimately be taken to the agency head (or commission), with review of the final agency decision by the courts. The adjustments process of the Federal Energy Regulatory Commission is an example. *See* P. SCHUCK, WHEN THE EXCEPTION BECOMES THE RULE, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, at app. A (1983). Another model allows for direct application for exceptions relief from a rule to the rulemaker itself (the program office or agency head). *See, e.g., id.* at app. C. The Supreme Court recently had occasion to consider the status of an application for an exception directed to a *court*. *See* District of Columbia Court of Appeals v. Feldman, 103 S. Ct. 1303, 1313 (1983)(request to court for waiver of bar examination rule requires court to evaluate purposes of rule and therefore requires a "judicial" decision).

[51] *See infra* notes 90-94 and accompanying text. Having created an apparatus of logical rules, Thurman Arnold argued, we continue to feel the need to create "separate institutions to represent common sense and benevolence." T. ARNOLD, *supra* note 14, at 62.

[52] *See infra* notes 425-30 and accompanying text.

C. *Regulatory Equity and Judicial Equity.*

The pursuit of equity in the regulatory process has certain obvious parallels to the more familiar, traditional phenomenon of judicial equity through case-by-case adjudications.[53] Both processes are animated by similar concerns about the limited ability of rules alone to achieve justice in particular cases. Both reflect some similar values and possess some common features. For example, each resolves particular disputes through adjudications that are legitimated in part by the use of explicit reasoned justifications subject to review by higher authority. Each process is informed through oral and written arguments developed through adversarial techniques. Each recognizes the relevance and authority of statutes, rules, prior cases, and other decision materials.

The significance of these similarities between agency and court adjudication is increasing at a time when Congress characteristically leaves courts to adjudicate without much statutory or constitutional guidance. Nevertheless, the differences between the ways in which courts and agencies deploy equitable values are at least as important as the apparent similarities, underscoring the distinctive character of regulatory equity. They also suggest why a specialized administrative organ or arrangement is often necessary to infuse regulatory equity into the administrative process.

1. *Institutional Purpose.* The dominant purposes of courts and agencies differ.[54] Characteristically, courts adjudicate the rights and obligations of disputants on the basis of principled justifications and distinctions derived from previously adopted legal norms. It is true, of course, that courts often advert to considerations of social policy, and to the predicted consequences of a decision for persons and interests not before the court. This occurs not only in public law litigation but increasingly in private law litigation as well. Despite the relevance of extra-litigation factors, however, the canons of the judicial craft and the requirements of judicial legitimacy continue to focus the court's analysis upon the claims of the parties before it. This naturally inclines the

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[53] By judicial equity, I refer not to the system of remedial justice traditionally administered by separate courts of chancery, but rather to the process by which courts that engage in common law adjudication integrate conceptions of situational justice into their decisions and thus into the resulting structure of legal rules.

[54] These differences are underscored by the fact that regulatory agencies are often created to perform a task that common law courts previously performed but performed (or so the legislature thought) poorly for reasons having to do with limitations imposed by the courts' methodology, values, or institutional character. *See, e.g.,* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified at 33 U.S.C. §§ 1251-1376 (Supp. V 1981)); National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935)(codified at 29 U.S.C. §§ 151-166 (1976)).

court toward a situational, particularistic orientation rather than toward more generalized policy prescriptions. When a court seeks equity, it does so by refining existing principles, carving out exceptions to them, or developing competing ones embodying a different array and weighting of values.

A regulatory agency, in contrast, is an engine of continuous social policy formulation and implementation. Although obliged to render neutral, principled decisions with respect to individual disputes brought before it, an agency's principal purpose is to effectuate an externally created but bureaucratically internalized legislative purpose, usually the protection of certain collective values or group interests. Thus, the Civil Aeronautics Board was established to promote the interests of the nascent airline industry, the Equal Employment Opportunity Commission to advance the rights of minorities, and the Environmental Protection Agency to safeguard the environment. This orientation encourages agencies systematically to undervalue particularized justice in favor of the social interests and policy goals that they are required to pursue through their regulatory programs. These interests and goals usually transcend those of the particular parties before them.[55]

2. *Types of Rules.* Common law adjudication often requires judges to devise new principles or rules where existing ones cannot fairly resolve a dispute or where no plausibly applicable rule exists at all. But the rules that courts elaborate through case-by-case adjudication typically differ in important respects from those that agencies develop in rulemaking—and even from those that they apply in agency adjudication. Agency rules are limited only by the very permissive contours of a typically broad and ambiguous statutory standard. An agency is permitted, even expected, to promulgate legislative-type rules that reflect the exercise of discretion, judgment, specialized knowledge, and political choice. Thus, agency rules often plunge into new policy realms, boldly occupying unfamiliar terrain and mapping it through a more or less comprehensive set of prescriptions. In such cases, justification need not rest upon principle, except insofar as the statute broadly supplies one; it is ordinarily enough that the rule not be inconsistent with the statutory standard and that it meet minimal standards

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[55] *See, e.g.,* Shepard v. NLRB, 103 S.Ct. 665, 670 (1983) (whereas a court of general jurisdiction will be more likely to grant a successful party's prayer for complete relief, an agency, even in the context of adjudication, need not order complete relief if it has legitimate policy reasons for limiting relief).

of rationality. Policy considerations, as mediated by agency "expertise," are thought to supply the necessary ingredients of decision.

In contrast, the kinds of rules that courts develop through case-by-case adjudication tend to cling parasitically to familiar moorings, only incrementally modifying solutions that have already been framed. Although it is commonplace for an agency to decide, for instance, that trucks on interstate highways shall be no more than 65 feet in length, it would be extremely unusual for a court to devise such a rule itself. That is the kind of particularized choice that a democratic society does not expect unelected generalist judges to make.[56]

There is an intriguing irony here, one highly relevant to the problem of regulatory equity. Although conceived as broad exercises of discretion, agency rules often take the form of relatively rigid, detailed prescriptions. Particularized justice cannot be achieved directly through such forms but only through an auxiliary mechanism, such as an exceptions process. Judicial rules, in contrast, are fashioned by tribunals whose discretion is systematically, indeed constitutionally, limited. Courts steadfastly refuse to acknowledge that they exercise discretion even (perhaps especially) when they clearly do. Yet the rules that emerge from this relatively constrained process usually take the form of general formulations whose flexible contours can easily accommodate the palliating impulses of situational justice. Agencies tend to spawn hard-edged rules that resist the solvent of further discretion; an equitable capacity must therefore be added. Courts, while eschewing discretion, tend to produce tractable, malleable rules capable of absorbing equitable claims as they arise in individual cases.

3. *Decision Procedures.* Given their distinct purposes and products, it is hardly surprising that the procedures and doctrines of courts and regulatory agencies differ significantly; procedures, after all, are intended to reinforce an institution's dominant goals even as they are shaped by those goals. Most court adjudication, for example, is structured to focus attention narrowly upon the claims of individual litigants rather than upon a decision's larger social consequences. The rules of evidence, the boundaries of the record, and principles such as

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[56] For an unusual and extremely controversial "exception" to this proposition, one that perhaps "proves the rule," see Roe v. Wade, 410 U.S. 113, 164-65 (1973)(prescribing different substantive standards for each trimester of pregnancy). See also the brace of cases defining the minimal number of jurors constitutionally permitted for criminal prosecutions: Ballew v. Georgia, 435 U.S. 223, 245 (1978)(five are too few); Williams v. Florida, 399 U.S. 78, 103 (1970)(six are enough). In reapportionment cases, the courts, as a result of their "one person, one vote" standard, have felt obliged to make exceedingly fine-grained numerical choices. *See, e.g.,* Karcher v. Daggett, 103 S. Ct. 2653, 2660-65 (1983).

those governing standing, ripeness, and intervention, for example, all reinforce this traditional, constrained view of the judicial function. Divergences from this model, of course, are increasingly countenanced, even encouraged. This does not mean that the model is incoherent or fails to describe most of what courts do, but only that it is under pressure to adapt to new functions traditionally associated with agencies and legislatures.[57]

For most regulatory agencies, however, individual dispute resolution is decidedly ancillary to the discretionary, policy development function,[58] a fact strikingly revealed in those agencies, most notably the National Labor Relations Board (NLRB), that rely upon adjudications almost exclusively as a mode of decision.[59] The powerful interest in yoking an agency's procedures to its policy objectives is demonstrated by the broad administrative discretion to reverse policy direction and abandon precedent *retroactively*[60] through adjudication despite the potential injustice to individual parties. Agencies are also permitted to adjudicate without the procedural safeguards of independence and objectivity characteristic of courts.[61] Far from being a source of illegitimate bias, the regulatory agency's policy commitments, its pervasive politicization, are mobilized so that the agency may better achieve its purposes.[62] The agency thus systematically subordinates the values of neutrality, principled decisionmaking, and particularized justice to the demands of a politicized, pragmatic policy instrument that seeks to transform certain domains of reality in prescribed ways.

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[57] *See* P. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 196-98 (1983).

[58] Of course, the vast majority of discrete decisions that agencies make involve neither the development nor the issuance of rules but rather the application of rules to particular firms or individuals. *See generally* Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976). This fact, however, only underscores the disproportionate significance to most agency policymaking of the relatively small number of rules that exist or are under development at any particular time, a significance augmented by the fact that agency rules are usually intended to influence a broader range of private decisions than court or agency adjudications.

[59] Commentators have almost universally condemned this approach. *See, e.g.,* Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103, 103 (1980); Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982 (1980); *see also* sources cited *supra* note 6.

[60] *See, e.g.,* NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974).

[61] For example, agencies may dispense with ALJ decisions, 5 U.S.C. § 557(b) (1982), and, under certain conditions, with cross-examination. 5 U.S.C. § 556(d) (1982). In "informal adjudication," APA procedural requirements do not apply at all. The extreme case may be the Immigration and Naturalization Service. *See* Schuck, *The Transformation of Immigration Law*, 84 COLUM L. REV. 1, 31-34 (1984).

[62] By politicization, I mean the circumstances of the agency's creation, its statutory setting, continuous congressional oversight, the appointment and recruitment processes, and its constant and intensive interactions with outside interests.

4. *Organizational Forms and Settings.* Even in an age of burgeoning judicial caseloads and complex forms of litigation, a court remains a remarkably solitary decisionmaker.[63] In the federal courts, at least, judges ordinarily employ only a small retinue of law clerks and researchers to assist them; in state courts, even a single clerk may be a luxury. Judges' physical and intellectual isolation mirror the traditional, limited conception of their function. Judging is viewed as a lonely, insulated, highly personalized task in which one applies logical and analytical powers, the corpus of legal rules, distillations of principle, and divinations of equity to the record. The record—principally evidence and arguments—has already been intentionally circumscribed by the procedures and conventions of litigation. Legal arguments are abstracted from the larger world of political struggle and social consequences, and drawn into the artificially confined world of the courtroom and the particular parties.

The contrast between this relatively closed, unpopulated milieu and the dense, teeming environment in which regulatory officials make decisions could hardly be more striking. From their perches in the organizational hierarchy, regulators preside over a swarm of bureaucratic, policy-generating activity. Their decisionmaking machinery, unlike that of judges, is highly differentiated—by function (e.g., policy development, enforcement, research), by programmatic subject matter (e.g., water, air, pesticides), by geography (e.g., field operations, state and local programs), and by other dimensions of specialization (e.g., legal counsel, economic analysis).

That courts exhibit little or no functional differentiation, and that agencies display a great deal, directly affects the way in which each goes about reconciling the competing claims of rule and equity. In the courtroom, particularity finds a limited sanctuary from the generalizing impulse of the outside world. The dominant judicial ethos holds that parties are entitled to corrective justice meted out to them as individuals, rather than to decisions that merely treat them as instances of an abstract class or category. Particularity looks to what they have done, not to the social interests that they may be said to represent. Rules of evidence, norms of relevance, the generality with which rules are often formulated, the availability of several rules from which the judge may choose, the importance of fact-finding to rule application, and other aspects of the judicial process reinforce this individuated conception of justice; they confine the court's attention to the parties' unique behavior and condition, keep rules at the perimeter of the judge's field of vision, and enlarge the scope of individuated justice.

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[63] Thoughtful commentators are concerned that this unique condition may be changing. *See, e.g.,* Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. — (July 1983)(forthcoming). *See generally* McCree, *Bureaucratic Justice: An Early Warning*, 179 U. PA. L. REV. 777 (1981).

In a court, the trier of fact also integrates the conflicting claims of rule and equity. As ad hoc decisionmakers without continuing life or responsibilities, juries are probably less preoccupied with maintaining a system of legal rules than with dispensing situational justice.[64] To a lesser extent, this is also true of judges, who do not systematically supervise any specialized policy system and who receive little feedback concerning how their equity-infused decisions affect the integrity or effectiveness of rules.

If courts respond primarily to claims of situational justice, regulatory agencies tend to undervalue or neglect such claims. Most agencies implement policy primarily through rulemaking, rule application, rule enforcement, and activities supportive of these functions, such as research. Some, like the NLRB, formulate their policies almost exclusively through rules adopted in individual case-by-case adjudications.[65] Rules are an agency's most visible, controversial and characteristic product, the focus of its political, legal, intellectual and social concerns. Congress, the media, regulated interests, "public interest" activists, and other attentive groups will evaluate an agency's performance almost exclusively in terms of the presumed consequences of its rules. Rules, in short, are an agency's center of gravity, its raison d'etre.

The agency's pursuit of situational justice, in contrast, is a relatively subordinate enterprise. More a constraint than a defining purpose, equity is the regulator's landfall, not her lodestar. In some agencies, equity receives no special structural expression at all.[66] In others, an exceptions process exists but it is preoccupied with relatively narrow, ad hoc, discrete adjudications decidedly ancillary to the central rule-related activities.[67] Coordination of regulatory equity and regulatory policy tends to occur, if at all, only sporadically at the upper levels of the hierarchy, far from the routinized disposition of exceptions cases. Regulatory equity, therefore, demands more than simply accommodating rule-based and situational justice, difficult as that is. When an agency bureaucratizes the process of justice-seeking and fragments the domains of rule and equity into specialized structures, it has created a formidable organizational problem. Unlike a judge, who combines these strivings in herself, an agency must somehow find a bureaucratic way to integrate the conflicting conceptions of justice that these specialized structures express.

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[64] *See* G. Calabresi & P. Bobbit, *supra* note 38 at 57.

[65] *See supra* note 59. There are combinations of these basic patterns. The Immigration and Naturalization Service, for example, designates certain of its adjudicatory decisions as "precedents," thereby creating the functional equivalent of a rule. *See* Diver, *supra* note 10, at 95.

[66] *See supra* note 49.

[67] *See e.g.,* P. Schuck, *supra* note 50, at app. G.

D. *Regulatory Equity and Policymaking Through Agency Adjudication.*

When regulatory equity is pursued in the context of an exceptions process, it takes the form of a particularized adjudication of the rights of individual claimants (or a class of similarly situated claimants) by the agency's exceptions tribunal. Not all agency adjudication, however, is designed to achieve regulatory equity in the "situational justice" sense in which I have defined it. Adjudication may also be used to pursue the agency's broader policy goals. Indeed, as noted above, all regulatory agencies use adjudication to elaborate and enforce their policies to some degree, and a few develop policy almost exclusively through the adjudicatory process.[68]

Despite the important differences in context and norms noted earlier,[69] agency adjudication in pursuit of broader goals resembles common law court adjudication. Like common law judges, agencies often develop rules by a gradual, case-by-case process of inclusion and exclusion, of line-drawing and classifying, as new fact situations come before the tribunal for decision. Through this process, general regulatory principles and policies become more and more determinate, hardening into specific agency rules.

This article will not rehearse the spirited arguments about the virtues and demerits of incremental agency policymaking through common law-type adjudication. Those arguments are well-presented in the scholarly literature.[70] Instead, I wish to emphasize a point that is easily obscured by certain formal similarities between common law-type agency adjudication and exceptions adjudication mentioned earlier. The former, properly understood, has essentially nothing to do with the pursuit of regulatory equity. The purpose of common law agency adjudication is to develop policy that can guide conduct in a relatively large number of future cases, not to avoid an unjust or anomalous outcome in a particular case. Common law agency adjudication thus cannot be legitimated in the same way as equity-seeking exceptions adjudication. The procedures necessary to legitimate the former must be designed to elicit a policy-oriented information base and broad public participation, not a situation-specific record, a narrow party orientation, and an emphasis upon procedural fairness to individuals.

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[68] *See supra* note 59.

[69] *See supra* note 38 and accompanying text.

[70] *See, e.g.,* Strauss, *Rules, Adjudication, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1258, 1274-75 (1974); *see also* sources cited *supra* note 3.

One must be careful, then, not to conflate what are actually two very distinct forms of adjudication that demand very different analytical and normative frameworks. This is difficult, however, for at least two reasons. First, at a formal level, these two types of adjudications resemble one another. Thus, the distinction between regulatory equity through exceptions, on the one hand, and policy development through adjudications, on the other hand, is far clearer analytically than it is empirically. Exceptions process adjudications can be understood as points arrayed on a continuum. Professor Aman has attempted to characterize this continuum by identifying three broad categories of exceptions decisions. Aman calls them "hardship," "fairness," and "policy" exceptions. In Aman's scheme, "hardship exceptions" focus primarily upon individual, unique characteristics of the applicant. "Fairness exceptions" do so as well but take particular account of the applicant's relationship to the program's regulatory goals and of the program's impact upon others similarly situated. "Policy exceptions" emphasize not the plight of particular applicants but the regulatory program's overall goals.[71] Obviously, one could describe numerous intermediate points along the continuum representing hybrid forms.

Typically, the exceptions process is established to adjudicate "hardship" cases, cases in which applying a rule to an individual would work injustice because the rulemaker failed to anticipate such an application and the rule's purpose would not really be served by it. This is regulatory equity proper. But such cases can shade imperceptibly into Aman's "fairness" domain, in which the situational justice considerations animating the decisionmaker are somewhat less weighty and the policy-sensitive considerations are somewhat more so. At some further point, also reached by subtle gradations of motive and orientation, the exceptions decision may seek not merely to achieve that rule's purposes more fully but to achieve agency policy goals that transcend the purposes of the rule from which relief is being sought. I have been at pains to emphasize that this "policy exception" is not regulatory equity, properly understood. But it can easily be mistaken for—and misrepresented as—a "hardship exception," which is regulatory equity proper. Even to the exceptions agency, it will not always be obvious where on the continuum a case should be located, especially in the early stages of adjudication.

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[71] Aman, *supra* note 6, at 293.

The second reason why regulatory equity and policy development through common law agency adjudication are easy to conflate is that both the exceptions applicant and the agency may be tempted to counterfeit the decision process by passing the latter off as the former. This is an especially promising strategy when, as in the DOE, the same bureaucratic unit performs both functions. The applicant's motivation for doing so is not difficult to imagine. The classic canons of adjudication, after all, encourage a litigant to portray his case as one involving a relatively narrow, situational claim rather than a broad policy issue. By exploiting the actual ambiguity of the hardship/fairness/policy exception boundaries, the applicant can often render this portrayal credible. The agency's incentives to adopt a similar strategy are equally powerful but considerably more complex. They require, therefore, a more extended analysis.

To an important extent, largely overlooked by scholars,[72] the use of the exceptions process for policymaking purposes can be understood as an administrative response to a set of constraints upon informal rulemaking under the Administrative Procedure Act. Ironically, these constraints have been imposed largely in the name of "regulatory reform." To a policymaker who wishes to change the prevailing regulatory course quickly, informal rulemaking is increasingly a process to be avoided. The APA requires the agency, at a minimum, to publish a notice of proposed rulemaking inviting written comments from interested parties, to "consider" those comments, and to publish the final rule to be effective at least thirty days thereafter.[73] The resulting rule is subject to judicial review[74] and may be stayed pending such review.[75] Although the notice and public procedure requirements, as well as the 30-day preeffectiveness period, may be waived upon certain agency findings,[76] these findings are themselves subject to judicial review.[77] Particular statutes may augment the APA procedures with additional requirements.[78]

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[72] For an exception, see Strauss, *supra* note 70, at 1245-48.

[73] 5 U.S.C. § 553 (1982).

[74] 5 U.S.C. § 702 (1982).

[75] 5 U.S.C. § 705 (1982).

[76] 5 U.S.C. § 553(b)(3)(B) (1982).

[77] *See, e.g.,* American Federation of Government Employees v. Block, 655 F.2d 1153, 1155 (D.C. Cir. 1981).

[78] These include, for example, requirements that the agency publish advance notice of proposed rulemaking or provide oral hearings with more or less procedural formality, multiple rounds of proposed rules, longer comment periods, or reports to Congress. Legislative veto provisions have also become commonplace. *But see* Immigration and Naturalization Serv. v. Chadha, 103 S. Ct. 2764 (1983).

In recent years, a variety of cross-agency "regulatory reform" measures—primarily statutes and Executive Orders—have burdened agency rulemaking with additional analytic procedures and layers of administrative review, including requirements for an environmental impact statement,[79] and a regulatory impact analysis satisfactory to the White House staff.[80] Particular regulatory statutes go even further. The Consumer Product Safety Commission, for example, must consider, analyze and make findings with respect to the effect of each of its rules upon many complex factors, and must publish these analyses along with the rule.[81] These requirements, of course, are themselves directly or indirectly subject to judicial review.[82]

Despite the extensive procedural, analytical, and political hurdles that must now be surmounted before an agency rule may be issued, its survival in the courts is by no means assured. This is true even when the scope of judicial review is narrow, as under the typical "arbitrary and capricious" standard.[83] Indeed, during the 1970's, the lower courts imposed substantial procedural requirements going well beyond those prescribed by the APA.[84] At least some of these additional requirements evidently survived the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,*

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[79] National Environmental Policy Act, 42 U.S.C. § 4332(c) (1976).

[80] Executive Order 12,291, 3 C.F.R. 127 (1982).

[81] 15 U.S.C. § 2058(c), (f) (1982).

[82] 15 U.S.C. § 2058(f)(4) (1982). Rules developed by the DOE, for example, are subject to especially time-consuming procedures. Under the Department of Energy Organization Act, each rule proposed by the DOE must be accompanied by a statement of the research, analysis, and other available information in support of, the need for, and the probable effect of the rule, and a response to the "major comments, criticisms and alternatives offered during the comment period." 42 U.S.C. § 7191(b) (d) (Supp. V 1981). Such requirements are unusual but not unique. *See, e.g.,* Consumer Product Safety Act, 15 U.S.C. § 2058 (1982).

In addition, the Secretary of Energy cannot issue rules until he first notifies the Federal Energy Regulatory Commission (FERC) of the proposed rules. If the FERC determines that the rules may significantly affect FERC functions, the Secretary must refer the rule to the FERC; the FERC must then invite additional public comment on the proposal and publish its recommendations, along with its own explanations of reasons and analysis of comments. Only after the FERC's recommendations are published can the DOE issue the rule. 42 U.S.C. § 7174 (Supp. V 1981). The necessity for formal references under section 7174 is minimized by a process of informal clearance with the FERC. Whether formal or informal, however, the process demands precious time.

If the DOE rules are economically and politically significant, as has often been the case, they must ordinarily be submitted for informal review by the White House policy staff. The regulations altering the base period for motor gasoline allocations during the 1979 shortage is an example. *See infra* notes 268-81 and accompanying text.

[83] The Supreme Court recently confirmed this proposition. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2866 & n.9 (1983).

[84] For an account of this evolution, see Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 348-52 (1979).

Inc., further increasing the vulnerability of rules on appeal.[85] But even where a rule is ultimately upheld on appeal, the delay in confirming—and if a stay pending appeal is granted, in implementing—the rule can be lengthy.

In short, informal rulemaking, which began as an open-ended, discretionary process analogous to a legislative hearing,[86] has evolved into a highly formalized, procedurally complex, rationalistic, and often quite protracted process.[87] This development casts a new light on what has been perhaps the central tenet of administrative reformers for decades—the notion that agencies should be encouraged, and in some instances required,[88] to elaborate agency policy through rulemaking rather than case-by-case adjudication.[89] But as pressures for increased formality, more extensive records, and analytical rigor have dissipated many of the much-celebrated virtues of informal rulemaking, certain advantages of case-by-case adjudication in general, and of exceptions adjudication in particular, have come to seem correspondingly great.

Some of these advantages are intrinsic to agency adjudication. By limiting the impact of decisions to their particular facts, agency adjudication facilitates cautious and flexible policy development and exploits incrementalism's considerable political and intellectual virtues.[90] In principle, agency adjudication limits the scope of factual inquiry, demanding fewer analytical resources than rulemaking and consuming less time. But case-by-case adjudication also has extrinsic advantages, peculiar to particular administrative contexts. In the context of DOE policymaking, for example, these advantages go far toward explaining the power, prominence, and aggressive use of an exceptions process.

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[85] *See, e.g.,* United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519, 534-35 (D.C. Cir. 1978)(agency required to disclose specifically any data relied on in reaching an administrative decision, in order to facilitate judicial review).

[86] *See* Scalia, *supra* note 84, at 346-47.

[87] Legislation that passed the Senate 94-0 during the 97th Congress, but was not enacted, would have made rulemaking procedures and analytical requirements even more complex, rigorous, and time-consuming than they already are, and would have applied them to the independent regulatory commissions as well as to executive branch agencies. *See* S. 1080, 97th Cong., 2d Sess., 128 CONG. REC. 52,713 (March 24, 1982).

[88] *See, e.g.,* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969). For a criticism of this approach, see Strauss, *supra* note 70, at 1265-66.

[89] *See, e.g.,* K. DAVIS, DISCRETIONARY JUSTICE 54-60 (1969). *See generally* sources cited *supra* note 53.

[90] *See* D. BRAYBROOKE & C. LINDBLOM, A STRATEGY FOR DECISION 88, 99-100, 111-12 (1963); *see also* Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 399 (1981). As Professor Strauss points out, adjudication can also defeat the bureaucratic inclination to defer difficult decisions. Whereas a rulemaking can often be put off indefinitely, a case that is before the agency must be decided. Strauss, *supra* note 70, at 1254.

First, policymaking by way of adjudication is particularly attractive where an agency's regulatory jurisdiction extends to a broad subject matter or to numerous and diverse regulated firms or individuals.[91] As a practical matter, such an agency must regulate through very general rules which must apply to many firms whose objective circumstances may differ quite radically. Even rules of this character are not infinitely elastic; they cannot be stretched to encompass such diversity without working some injustices. They are inevitably overinclusive. Hardship exceptions must be available to accommodate these "bad fits," and this can only be accomplished on a case-by-case (or perhaps a class-by-class) basis.

This jurisdiction-related temptation to proceed by case-by-case adjudication is even stronger when the program is conceived to be emergency in nature.[92] In such situations, rules must be issued quickly, often in wholesale lots.[93] Hastily prepared, overbroad rules can be disastrous for those who technically are covered by the rules but to whom the rules should not, in justice or sound policy, be applied. Inflexible application of such rules may quickly create grave competitive distortions, perhaps even driving firms out of business before the rules can be refined or eliminated. Again, if relief is to be granted in such cases, adjudication will be necessary to identify the specific situations in which the rule pinches. Furthermore, emergency programs are usually expected to be of short duration, remaining in effect only so long as the exigent conditions persist. Thus, an agency may regard the delay, analytical requirements, personnel demands, and other costs associated with developing a rule as unjustified or simply prohibitive.

Agency adjudication may also seem particularly attractive when the rulemaking process is ineffective for any of a number of intellectual, bureaucratic, or political reasons. An agency, for example, may be paralyzed by uncertainty as to what policies to adopt, unable to mobilize the bureaucratic machinery at its command, or unwilling to run the political risks that difficult policy decisions often entail. Where hard choices must be made but the rulemakers cannot or will not make them, the decisions may fall by default or delegation to adjudicators.

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[91] For example, the DOE's regulatory jurisdiction was sweeping with respect to both subject matter and number of firms. Its authority embraced all aspects of the pricing and allocation of crude oil and petroleum products at all levels of production and distribution by literally hundreds of thousands of firms. *See infra* notes 100-26 and accompanying text.

[92] Again, petroleum regulation provides a vivid example. *See infra* notes 108-09 and accompanying text. Whether the petroleum regulatory program as a whole responded to or created and exacerbated an emergency situation (or both) is an important question, but one that I shall not address in this article. For sharp cricitisms of the program, see sources cited *infra* note 96.

[93] The basic petroleum price and allocation regulations under the Emergency Petroleum Allocation Act (EPAA), for example, were issued in a batch within weeks of the law's enactment. They essentially replicated the earlier Phase IV regulations. 10 C.F.R. §§ 202-215 (1975).

Finally, agency adjudication typically enjoys lower visibility and hence greater freedom from outside control than rulemaking. In certain contexts, this may constitute an important advantage to cautious policymakers. Even where policymakers possess the capacity and will to make hard choices, they may nonetheless wish to limit their exposure to political reprisals for unpopular decisions. In such cases, they may search for a bureaucratic cover or buffer that can deflect criticism over controversial decisions away from themselves.[94] Because agency adjudication purports to affect only one or a few firms or individuals, it seldom invites widespread public participation, media coverage, or congressional scrutiny; moreover, it can be readily reversed or limited in future cases if that should seem prudent. Adjudication, unlike policymaking, can also wrap itself in the mantle of judicial legitimacy and independence. Regulatory equity is a more appealing slogan than regulatory change.

Several points about the above discussion should be stressed. First, these particular advantages of the case-by-case approach tend to be distributed in a highly skewed fashion; they accrue almost exclusively to the agency, not to regulated firms or the general public.[95] The disadvantages of adjudication, however, are borne in just the reverse pattern. For example, a body of law or policy is less comprehensible, predictable, or subject to public criticism when it only evolves case-by-case, and when participation may be costly. Adjudication's skewed distribution of benefits and costs, combined with the growing administrative burdens associated with rulemaking, means that agencies—especially those with broad regulatory jurisdiction, politically controversial policies, emergency authority, and a disabled rulemaking apparatus—will often find adjudication a congenial vehicle for policy development. As we shall see, DOE met all of these conditions. Not surprisingly, it adopted this decisionmaking strategy with enthusiasm. Its tactical instrument for doing so was process.

Second, many of the considerations that make rulemaking seem inadequate as a regulatory tool may imply not that case-by-case adjudication is a superior mode for implementing regulatory policy, but that the particular market should not be subjected to regulation of a command-and-control variety at all.[96] In this view, regulatory inequity is so pervasive in such a program that an exceptions process attempts to use band-aids to staunch a massive hemorrhage. In the analysis that follows, however, I shall not question the wisdom or legitimacy of the regulatory program but shall analyze the exceptions process on the assumption that the program of which it was a part was congressionally mandated and therefore legitimate.

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[94] *See, e.g.,* Note, *supra* note 59, at 987-99.

[95] Of course, certain other advantages of adjudication—for example, its greater accuracy with respect to so-called "adjudicatory facts"—inure to the public as well as to the agency.

E. *Regulatory Equity and the Exceptions Process.*

In this part, I raise some fundamental questions about the role of exceptions in the regulatory process, questions that the remainder of this study will address. They may be organized around five related problems.

1. *The Problem of Functional Integration.* Does the exceptions process simply serve the situation-oriented, particularistic concerns of equity in particular cases, or does it also implicate the agency's larger policymaking functions? If the exceptions process affects both, how does the agency manage to integrate equitable and policy development purposes without sacrificing the distinctive values of each?

2. *The Problem of Organizational Integration.* Does the bureaucratic organization of the exceptions and rulemaking processes affect the way in which the agency's rules are formulated, interpreted, and enforced? Does that organizational structure affect the way in which exceptions decisions are actually made? Does it solve the problem of functional integration? What values are served and sacrificed by that particular structure?

3. *The Problems of Equitable Criteria and Legitimacy.* How can the exceptions process establish and preserve legitimacy and integrity in a decision context that invites imputations of favoritism, political pressure, ad hoc judgments, and unequal treatment?

4. *The Problem of Procedures.* Does the exceptions process employ procedures that are adequate to the kinds of tasks that it under-

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[96] Although an evaluation of the merits of regulating the petroleum industry in the manner that Congress directed is far outside the scope of this article, it bears noting that the program was repeatedly criticized by economists and others as being inherently flawed and inevitably counterproductive. *See, e.g.,* K. ARROW & J. KALT, PETROLEUM PRICE REGULATION: SHOULD WE DECONTROL? 46-47 (1979); S. BREYER, REGULATION AND ITS REFORM 120-30 (1982); FEDERAL ENERGY ADMINISTRATION REGULATION: REPORT OF THE PRESIDENTIAL TASK FORCE 139-46 (P. MacAvoy ed. 1977).

takes? Are its procedures appropriate both to the pursuit of regulatory equity and to common law-type agency adjudication? In particular, how can it organize what is an essentially adjudicatory process to generate decisions that are not only procedurally fair to individual parties but also expeditious and sensitive to political and policy factors?

5. *The Problem of Accountability and Control.* What roles do other institutions—the department, the Congress, the courts, and private groups—play in structuring and influencing the various functions that the exceptions process exercises? How well do these other institutions actually perform them and how should those roles be altered?

After examining microscopically the exceptions process in action in Part II and analyzing those findings in Part III, I shall return to these problem areas in Part IV, using them as analytical foci for evaluating the exceptions process.

II. THE EXCEPTIONS PROCESS AND ENERGY POLICY

To comprehend the functions and significance of the exceptions process in federal energy regulation, we must first examine the program of energy regulation in which that process was embedded and the formal organizational structure of which it was a part.

A. *The Petroleum Industry and Federal Regulation.*[97]

Since the first oil wells were drilled at Titusville, Pennsylvania in 1859, the American oil industry has become the most complex in the world, an extraordinarily intricate network of companies and activities linking crude oil sources and consumer markets, both foreign and domestic. Industry activities fall into four general categories: production (exploration for and removal of crude oil from natural formations); refining (the manufacture of crude into gasoline, motor oil, heating oil, petrochemicals, and other intermediate and end-use products); distribution (physical transportation, storage, handling, and delivery of petroleum products); and marketing (sales of approximately 500 refined products to wholesale and retail customers).[98]

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[97] The brief discussion that follows provides only the most schematic description of the petroleum industry and its regulation. The draft prepared for the Administrative Conference of the United States (ACUS) contains more details. *See supra* note 50. For an even more comprehensive survey, see generally ENERGY POLICY IN PERSPECTIVE: TODAY'S PROBLEMS, YESTERDAY'S SOLUTIONS (C. Goodwin ed. 1981) [hereinafter cited as ENERGY POLICY]; J. KALT, THE ECONOMICS AND POLITICS OF OIL PRICE REGULATION (1981); PETROLEUM REGULATION HANDBOOK (J. Bell ed. 1980); W. LANE, THE MANDATORY PETROLEUM PRICE AND ALLOCATION REGULATIONS: A HISTORY AND ANALYSIS (1981).

Different segments of the industry combine the four basic activities in various ways. Approximately fifteen to twenty large, usually multinational companies integrate all four operations. This group (Exxon, Gulf, Texaco, and others—"the majors" in industry parlance) dominates the industry. In September 1981, for example, the fifteen largest integrated refiners processed nearly 70 percent of all motor gasoline and approximately 55 percent of middle distillates—a decline in both categories from 1972 but still accounting for the majority of refinery production. Independent refiners, which produce little or none of the crude they refine, processed the remainder. Independent refiners range from small firms, with capacities as low as 10,000 barrels per day (BPD), to large independents, like Ashland Oil, with a capacity as high as 400,000 BPD, rivaling the integrated companies' capacities. Geographically, refiners tend to cluster near port facilities, major markets, or large domestic oil fields.[99] In less densely populated regions, such as the Midwest and Rocky Mountain states, small and independent refiners often process a relatively large proportion of total product.

The first federal efforts to regulate the petroleum industry attempted to buttress state regulations. In the 1930's, Texas and other states initiated "conservation" measures to stabilize domestic oil prices by controlling production levels. Congress then enacted the Connolly "Hot Oil" Act,[100] prohibiting the interstate transportation of product in violation of state laws.

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[98] The major products include naphtha (used for jet fuel), propane and butane (used as aviation fuel and in chemical processes), motor gasoline, aviation gasoline, middle distillate fuel oil (including lighter grade home heating oils, diesel fuel, kerosene, and range oil), residual fuel oil (a heavier fuel oil often used in industry), asphalt, road oil, and coke.

Although most large refiners distribute and market their products over a wide area or even nationwide, others, such as Ashland Oil and Sohio, operate in well-defined marketing regions where they enjoy a large market share. Both crude and product markets are affected by substantial imports; the New England market for residual fuel oil, for example, receives much supply from Caribbean refineries. In the specialized motor gasoline market, refiners market only about 16% of their product directly to bulk purchasers or through refiner-owned retail outlets. The other 84% goes to "independent marketers," consisting of dealers that lease stations from the refiner or own their own stations and market under the refiner's brand, and "jobbers," who buy gasoline at wholesale and either market it themselves (branded or unbranded) or sell it to other stations. The proportion of total branded and unbranded product sold to jobbers rose to over 50% between 1972 and 1981, reflecting regulations that favored jobbers and a national trend toward discount "gas and go" stations run by jobbers. Jobbers traditionally rely upon the independent refining sector for most of their supply.

[99] The largest center, on the Texas-Louisiana Gulf Coast, supplies a large portion of the Midwest and East Coast markets. Refining centers around Los Angeles, San Francisco, and Seattle supply most of the West Coast and Rocky Mountain states. Other major refining areas include the eastern Pennsylvania-New Jersey region and the Chicago area.

[100] 49 Stat. 30 ch. 18 (1935), codified at 15 U.S.C. § 715 (1982).

After World War II, as United States production capacity increased substantially, foreign supplies began to reduce domestic oil prices. The federal government responded with voluntary import quotas, and in 1958 the Mandatory Oil Import Program (MOIP) was adopted, imposing binding quotas.[101] Combined with the state "conservation" laws, these quotas stabilized domestic crude prices at levels well above prevailing world prices. Although the MOIP differed from the economic controls of the 1970's, which sought to hold domestic prices *below* world levels, many features of the MOIP continued in the controls program despite the vastly altered environment.

Three continuities are particularly worth noting. First, the MOIP protected the domestic refining industry by restricting imports of refined products while permitting imports of crude. An important exception to the import restriction was that East Coast imports of residual fuel oil were allowed, apparently for political and pollution control reasons and to permit oil to compete with coal for generating electricity; the East Coast refiners were thus discouraged from producing residual fuel oil. This favorable treatment for East Coast product imports was continued in the entitlements program and is still reflected in the low production of residual fuel oil by East Coast refiners. Second, the MOIP allocated imported crude quotas among domestic refiners on a basis that benefitted small refiners, an advantage later continued in the "small refiner bias" of the entitlements program, discussed below. Finally, the MOIP was used to promote a number of other domestic policy objectives also pursued in the 1970's controls, including developing the Puerto Rican economy, encouraging low-sulfur fuel imports for environmental reasons, and preserving independent marketers in the Northeast.

By 1973, the MOIP had outlived its usefulness. World prices were gradually increasing to domestic levels, domestic excess capacity was disappearing, and localized shortages had appeared. In April 1973, President Nixon amended the MOIP to phase out quotas by 1980 and to establish a new import fee system.[102] The same factors that led him to curtail the MOIP, however, also created political demands for more comprehensive regulation of domestic prices. These demands were met in March 1973, when special controls were imposed on the petroleum industry.

The petroleum industry had already been subject to the economy-wide anti-inflation controls under the Economic Stabilization Act of

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[101] Bell, *Introduction to Federal Petroleum Regulation*, in PETROLEUM REGULATION HANDBOOK *supra* note 97, at 1.

[102] *Id.* at 3.

1970, introduced in August 1971 as Phase I.[103] These controls, relaxed somewhat when Phase II was introduced in November 1971,[104] were removed administratively in December 1972 (Phase III),[105] and for a brief period the petroleum industry, along with the rest of the economy, was free of federal controls. But only three months later, in response to pressures on crude and product prices, the administration reimposed selected controls. An economy-wide price freeze followed in June 1973[106] ("Phase III ½"), intended to last for 60 days until the Cost of Living Council (CLC) could establish a new system of mandatory price controls for the entire economy.

In August 1973, the CLC issued the Phase IV regulations,[107] the first ever developed specifically for the industry. These imposed mandatory price controls on crude oil and petroleum products. Crude oil was divided into two tiers: "old" oil, the price of which was controlled at May 1973 levels plus 35 cents per barrel; and "new" oil, which could be sold at market prices. Refiners could increase their prices only to the extent that prices of their own product inputs increased. Phase IV was expected to be temporary; in fact, it turned out to be temporary for all sectors other than the petroleum industry. It did not impose allocation controls. Some shortages had developed during the winter of 1972 and smaller, independent refiners who did not control their own crude sources were seriously concerned. Independent marketers, which had benefitted from the previous period of surplus domestic crude, now faced potentially severe dislocations and also sought protection from shortages. Bills granting to the President power to address this problem had been introduced in Congress earlier that year, and when the Arab oil embargo was imposed in October 1973, an allocation program became inevitable.

On November 27, 1973, Congress, acting in a crisis atmosphere, enacted the Emergency Petroleum Allocation Act (EPAA),[108] extending the 1970 price control authority as it applied to the petroleum industry and adding new authority for comprehensive allocation controls. EPAA remained the basic federal statute governing the petroleum industry from 1973 to 1981. It did not prescribe any particular form of price or allocation controls but delegated to the President extremely broad authority to develop and promulgate regulations.[109] On December 4, 1973, the Federal Energy Office (FEO) was created by Executive Order to prepare and implement the regulations mandated by the EPAA.[110] Authority to administer the Phase IV controls was transferred to the FEO three weeks later. On June 27, 1974, the Federal Energy Administration (FEA) Act[111] became effective. This Act established the FEA as the successor agency to the FEO and contained administrative and substantive provisions concerning the price and allocation regulations. In October, 1977, the FEA was superseded by the DOE.

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[103] Pub. L. No. 91-379, tit. II, 84 Stat. 799 (1970)(codified as amended at 12 U.S.C. § 1904 (1982).

[104] *See* Bell, *supra* note 101, at 3.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] Pub. L. No. 93-159, 87 Stat. 627 (1973), codified at 15 U.S.C. § 751 (1982).

The price regulations administered by the FEO and the FEA under the EPAA incorporated the Phase IV regulations. The two-tier pricing system for crude oil continued, while refiner prices and margins remained frozen at May 15, 1973 levels, with price increases allowed only to the extent of increased costs. Marketers, subject to an original ceiling price frozen as of August 1, 1973, were also allowed to pass through the increased product costs resulting from rising world crude prices. The initial allocation regulations were published on January 15, 1974. These regulations froze commercial relationships in the distribution chain for crude and petroleum products, and allocated supplies at each level based on historical purchase patterns.[112]

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[109] As provided by section 4(b)(1) of EPAA, Pub. L. No. 93-159, 87 Stat. 627 (1973), codified at 15 U.S.C. § 753(b)(1) (1982), the regulations must "to the maximum extent practicable . . . provide for—

> (A) protection of public health . . . , safety and welfare . . . ;
> (B) maintenance of all public services . . . ;
> (C) maintenance of agricultural operations . . . ;
> (D) preservation of an economically sound and competitive petroleum industry . . . ;
> (E) the allocation of suitable types, grades and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;
> (F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry . . . ;
> (G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—
>   (i) fuels, and
>   (ii) minerals essential to the requirements of the United States . . . ;
> (H) economic efficiency; and
> (I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

[110] Exec. Order No. 11,748, 3 C.F.R. 376 (1974).

[111] Pub. L. No. 93-275, 88 Stat. 96 (1974), codified at 15 U.S.C. § 761 (1982).

[112] Producers were required to continue selling to the refiners with whom they had dealt on the effective date of the freeze, December 1, 1973. Domestic refiners, in turn, were obligated to continue supplying the distributors to whom they had sold during the corresponding month of calendar 1972, the "base period." Finally, distributors and refiners were obligated to continue supplying end users who were base period bulk purchasers of product.

In addition to this general allocation freeze, crude was allocated among refiners under the "buy/sell" program established on February 1, 1974. The program, designed to ensure that all domestic refineries operated at the same proportion of their refining capacity, allocated the total amount of available crude among refiners according to current refining capacity. Refiners whose ratios of production to capacity were in excess of the national average supply-to-capacity ratio were required to sell their excess to those whose ratios were below average.[113]

A second crucial regulatory policy toward refiners was the "entitlements" program, established in December 1974. Because individual refiners' access to price-controlled crude varied, their input and product costs differed substantially under the regulations. Even under normal conditions, these differences could severely affect competition; in a shortage situation, refiners without access to price-controlled oil could soon be driven out of business. A refiner's access to old oil usually depended upon its supply contracts and relationships with producers. The larger, more integrated companies usually, though not invariably, had the greatest access to controlled crude. Texaco, for example, benefitted from its own large domestic production, and many small refiners had long-term contracts for domestic crude, but other refiners depended heavily on foreign contracts.[114] In order to lessen these cost and competitive disparities, the FEA required refiners with good access to price-controlled crude to subsidize those with poor access to it until crude cost differences resulting from differential access were essentially eliminated.

Initially, each refiner received a number of "entitlements" to buy old oil.[115] Entitlements had a fixed, uniform value. Refiners that purchased low-cost old oil for themselves had to make payments (i.e., had to purchase entitlements) to raise the net cost of their crude to the national average cost per barrel. Refiners that bought uncontrolled oil or imported crude could receive payments (i.e., could sell entitlements) to lower the cost of their higher-priced crude to the national average.

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[113] Sales were to be made at the sellers' weighted average acquisition cost, plus a small handling fee. Allocations were made quarterly; during the February-April 1974 quarter, the first under the program, 56 million barrels of crude changed hands under the program.

[114] An example was Ashland Oil Co.; *see infra* note 234 and accompanying text.

[115] The number of entitlements was based upon a company's crude runs to stills (i.e., the quantity of crude it had refined) multiplied by the average proportion of old oil processed in all refineries nationwide, known as the National Old Oil Supply Ratio. The FEA and later the ERA administered the entitlements program by publishing a monthly list that stated how many entitlements each refiner was permitted to sell or required to buy. In order to base entries in the entitlements list on actual rather than projected statistics on processing by refiners, the agency published each list approximately two months subsequent to the month to which the list applied.

As originally conceived, the value of entitlements was based on only two price "tiers," derived from the average prices of controlled and uncontrolled crude. At least in theory, competition would determine how the crude within each tier would be distributed. To a large extent, the entitlements program was designed to benefit the small refiners. Their political influence had already enabled them to extract not only a "bias," granting them extra entitlements under the regulations, but also an opportunity to apply for special exceptions relief under the *Delta-Beacon* standards, discussed in Part V. Indeed, for a brief period in 1975-1976, small refiners received a full exemption from entitlement purchase obligations, and when the FEA withdrew the exemption, it reinstituted the small refiner bias at an even higher level and continued to grant exception relief.

Allocation programs were also established for motor gasoline and for distillate. When the Arab oil embargo was imposed at the beginning of the 1973-1974 heating season, distillate supplies needed for heating, agriculture, and other essential services were very low; significant spot shortages had occurred the previous winter. Energy regulators encouraged distillate production rather than gasoline production, probably exacerbating shortages of the latter, and then allocated distillate among users.[116] Gasoline allocation was similar in many respects to distillate allocation, but did not attempt to reach all end users.[117] Lines at gasoline pumps, which became notorious during January and February 1974 and in the spring and summer of 1979, performed this function.

When the Arab boycott ended in the spring of 1974, the crude shortage that spawned the EPAA quickly disappeared. Although no more severe shortages occurred until 1979, the intervening increases in world prices created substantial differentials between world prices and domestic controlled prices. To have allowed domestic prices to rise to world levels would have rapidly increased domestic product prices transferring wealth from consumers to crude producers, most of whom had made their investments in the far different economic climate fos-

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[116] Distillate was allocated first to priority users, at a level equal to their current requirements, and then to all other users on the basis of complex formulae that took into account both consumption during a representative historical period and presumed conservation effects.

[117] Priority users (e.g., agricultural production, emergency services, energy production, sanitation services, telecommunications, and transportation services) were entitled to 100% of their current gasoline requirements. All other wholesale and end-use bulk purchasers were entitled to 100% of their consumption in the base period, the corresponding month in 1972. Three percent of a state's total supplies was set aside for the state's allocation office to distribute. Retail gasoline outlets were left to compete for whatever supplies remained—a volume estimated to be about 20% below forecast normal demand during the first quarter of 1974.

tered under the MOIP. Unwilling to countenance either of these results, Congress instead chose to extend the EPAA, first briefly in September 1975[118] and again in the Energy and Policy Conservation Act (EPCA) of 1975,[119] which set a final expiration date of September 30, 1981. The disparity between world and domestic prices also enabled energy regulators, largely through the entitlements program, to create a system of monthly transfers between refiners involving over two billion dollars annually.[120] This program generated intense support for continuing controls among small refiners and other segments of the industry that benefitted from regulation.

Between the enactment of the EPCA in 1975 and the beginning of the Iranian supply disruption in late 1978, Congress passed several additional laws affecting petroleum prices and allocation, most notably the Energy Conservation and Production Act of 1976 (ECPA)[121] and the Department of Energy Organization Act of 1977 (DOE Act).[122] The ECPA extended the FEA for 18 months, to December 31, 1977, modified the crude pricing formula under the EPAA, exempted crude from "stripper" wells (those producing ten barrels per day or less) from controls, and sought to stimulate tertiary production. The DOE Act merged the functions of the FEA, the Energy Research and Development Administration, the Federal Power Commission, and parts of several other departments and agencies to form a cabinet-level Department of Energy. As part of this consolidation, the FEA's oil regulatory functions were transferred to a new Economic Regulatory Administration (ERA) within the DOE.

Even more important than the statutory changes during this period were the administrative ones. The price and allocation regulations were formally amended over 200 times in the seven years following their promulgation in January 1974, and many of these changes were extremely complex. Two-tiered pricing for crude, begun in 1973, evolved into a far more intricate system. Refiner pricing became elaborate. After the Arab embargo, regulatory changes transformed the buy-sell program from one designed to equalize all refiners' access to crude supplies into a means by which the 15 major integrated refiners were to supply, on a pro rata basis, the aggregate volume of crude to which a designated number of refiner-buyers were entitled. By 1979, only a subset of small independent refiners (as defined by the EPAA) qualified as refiner-buyers eligible to receive buy-sell program allocations.

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[118] Emergency Petroleum Allocation Act of 1975, Pub. L. No. 94-99, 89 Stat. 481 (1975)(codified at 42 U.S.C. § 6201 (1976)).

[119] Pub. L. No. 94-163, 89 Stat. 871 (1975)(codified at 42 U.S.C. § 6201 (1976)).

[120] The agency was able to use the entitlements program, as we shall see in Part V, to advance various ancillary policy purposes.

[121] Pub. L. No. 94-385, 90 Stat. 1125 (1976)(codified at 42 U.S.C. § 6801 (1976)).

[122] Pub. L. No. 95-91, 91 Stat. 565 (1977)(codified at 42 U.S.C. § 7101 (Supp. V. 1981)).

After 1976, doubts grew on Capitol Hill and at the DOE about the economic justifications for special benefits for small refiners. Exceptions relief for small refiners was curtailed, the small refiner bias built into the entitlements program was reduced, and the pool of entitlements funds was increasingly used to meet objectives other than the equalization of crude costs.[123] The exceptions process itself was used to subsidize, among others, producers of California heavy crude, Puerto Rican naphtha, and gasohol.

By 1979, then, the "temporary" structure established to regulate price and allocation during the 1973-1974 emergency had grown exceedingly complex and deeply entrenched. Both Presidents Ford and Carter had indicated a desire to end controls and many DOE officials had agreed. Decisive action, however, was prevented by the political influence of small refiners and other beneficiaries of regulation, Congress's suspicion of the major oil companies and its desire to maintain low prices, and bureaucratic self-interest at the DOE. An additional shock was needed to precipitate decontrol, and the Iranian Revolution supplied it. The three month halt of Iranian oil exports in late 1978 and early 1979 created a shortage of only three to five percent of U.S. supply; the 1973-1974 shortfall had been more than twice as great. Yet the 1979 shortfall, exacerbated by a cumbersome and anachronistic regulatory structure, produced gasoline shortages in some areas that were more severe than in the previous crisis.[124] Obviously, the need for a major policy change had become urgent.

In the short run, the shortage and gasoline lines simply ushered in a new generation of regulations.[125] Spasmodic changes in the price and allocation rules for motor gasoline and distillates generated bitter criticism because they created uncertainty and revealed regulatory incompetence. In addition, the absence of Iranian oil, along with production slowdowns by Saudi Arabia and other Organization of Petroleum Exporting Countries (OPEC) nations during the late 1970's, pushed world crude prices in the spot market to levels far above contract prices, an unusual phenomenon for the industry. Many independent refiners were hard-pressed to compete with refiners that had access to domestic-controlled crude or foreign contract crude. Because the entitlements program simply averaged the prices of foreign contract, spot market, and all other forms of uncontrolled crude in calculating refiners' benefits and obligations under the program, it could not compensate those refiners forced to resort to the spot market for much of their crude. The buy-sell program, enhanced through additional allocations and increased in scope to help address this problem, and the OHA granted relief in the form of substantial exceptions to a handful of large firms in a similar predicament.

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[123] These objectives included, among others, the subsidization of producers of Alaskan North Slope (ANS) crude, new refiners, producers of petroleum substitutes, importers of residual fuel oil from Caribbean refiners, Puerto Rican naphtha producers, and purchases of crude to fill the Strategic Petroleum Reserve.

[124] See *infra* notes 268-326 and accompanying text (for a detailed discussion of this episode).

[125] This regulatory response is discussed in Part V, *infra*.

But these were desperate expedients. The regulatory breakdown had demonstrated that the system would have to be dismantled. On April 5, 1979, President Carter introduced a plan to phase out the controls by September 30, 1981, when the EPAA was due to expire. Deregulation began on June 1, 1979 with the decontrol of newly discovered crude, the gradual conversion of lower tier crude to upper tier prices, and the gradual decontrol of upper tier crude. On January 28, 1981, President Reagan removed controls completely. He later both vetoed a bill that would have authorized the President to reimpose controls and sought to dismantle the DOE itself. Yet even at this writing, over three years after formal decontrol, the DOE continues to struggle with the vestiges of the regulatory system.[126]

B. *The Administrative Structure of the Exceptions Process*.

Although the Office of Hearings and Appeals (OHA) remains remarkably unchanged since its inception (under a different name) in 1973, its position in the energy regulatory structure has changed. These changes have gradually increased its formal authority and institutional independence, while centralizing its decisionmaking.

OHA traces its authority to section 202 of the Economic Stabilization Act of 1970, which specified that the price regulations "may provide for the making of such adjustments as may be necessary to prevent gross inequities."[127] Under Phase I of the controls, the Cost of Living Council (CLC), was authorized to "make exceptions or grant exemptions."[128] Beginning in Phase II, the CLC's two operating units, the Pay Board and the Price Commission, shared responsibility for considering individual exceptions applications. Melvin Goldstein, a lawyer who had worked at the Price Commission and then (after a very brief stint at the Federal Trade Commission) at the FEO, helped to transform the exceptions function from a rigid committee process into a less formal one emphasizing decisions written by individual analysts. When Congress established the FEO, it dispersed price exceptions authority among different agencies.[129] In early 1974, the FEO created an Office of Exceptions and Appeals (OEA) to concentrate responsibility for all exceptions relief;[130] Goldstein was named Director.

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[126] Indeed, in the case of the entitlements program, the remaining "loose ends" concern the disposition of perhaps *billions* of dollars in subsidies. *See* Mobil Oil Corp. v. DOE, 520 F. Supp. 420, 429 (N.D.N.Y. 1981); *see also supra* note 4.

[127] Pub. L. No. 91-379, 84 Stat. 796, 799 (1970), *reprinted in* 12 U.S.C. § 1904, 2859 app. (1970).

[128] Exec. Order No. 11,615, § 4, 3 C.F.R. 602, 604 (1971-75 Comp.).

The Federal Energy Administration (FEA) Act of 1974 mandated a broader exceptions process, and the FEA placed the OEA within a new Office of Private Grievances and Redress (OPGR)[131] along with a new Office of Special Redress, responsible for handling "those matters for which an appropriate regulatory process does not exist."[132] This reorganization consolidated and extended Goldstein's authority, making him Director of the OEA and the OPGR as well as de facto director of the Office of Special Redress. The DOE Organization Act of 1977 placed the OPGR (renamed the Office of Administrative Review), the OAR, and the policy-making, enforcement, and regional offices under the Economic Regulatory Administration (ERA) within the DOE. When Goldstein threatened to resign unless his units were taken out of the ERA, the Secretary capitulated and established the "Office of Hearings and Appeals" under a delegation of authority running directly from the Secretary, not from the ERA Administrator.

Goldstein also wrote the order defining the OHA's jurisdiction.[133] This order went into effect March 30, 1978 and extended the OHA's authority in several ways. It retained the authority granted the Office of Administrative Review to issue exceptions, exemptions, appeals, special redress orders, modification and rescission orders, and stays of orders and rulings in its pending proceedings. It also obtained authority to issue final remedial orders in enforcement cases, following the

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[129] The IRS heard requests by retailers for price exceptions of less than one cent per gallon, and a unit in the FEO's Office of Planning and Policy considered all others.

[130] The OEA was supposed to consider applications for exceptions, appeals from all orders issued by the FEO national office, and appeals from Regional FEO office decisions that presented issues of major economic or policy impact or established significant precedents. The OEA was also supposed to evaluate requests for exemptions, or "general exclusion[s] of a class of subjects from the scope of the regulations," which entailed "significant economic and other policy considerations." As soon as feasible, authority to consider retail price exception applications of less than three cents was transferred from the OEA to the FEO Regional Offices.

[131] The old Oil Import Appeals Board, responsible for considering appeals under the MOIP, was also placed within the OPGR.

[132] *See* Memorandum from John Sawhill, FEA Administrator, to FEA Senior Staff and Regional Administrators, at 3 (Nov. 21, 1974).

[133] DOE Delegation Order No. 0204-24, March 30, 1978.

ERA's issuance of proposed remedial orders. It retained the power to review its own exceptions decisions, which had the effect of creating another hurdle for litigants prior to FERC review. The OHA also received a general residual authority to "[c]onduct adjudicatory proceedings and issue orders in any instance in which a statute vesting authority in the Secretary requires an adjudication or appellate procedure and express Departmental procedures do not specify the manner in which the statutory authority is to be exercised."[134]

Perhaps most importantly, the new delegation order assured the OHA considerable autonomy from other departmental policymakers. Previously, the only formal brake on OHA exceptions decisions, apart from the remote possibility of a Secretarial veto, was a requirement that an administrative review committee, consisting of the program office and the Office of the General Counsel, concur in every significant exceptions order before it could be issued.[135] Disagreement within the committee would trigger review by the Deputy Secretary or the Secretary. The new delegation order, however, allowed unilateral OHA action on "interlocutory orders" and "extension of relief previously provided," an authority that the OHA was to use in some of its most important cases.[136]

Even with regard to final orders, however, the OHA was able to utterly dominate the committee process. During the early years of the exceptions process, committee clearance had brought other agencies' high level programmatic and policy expertise to bear upon exceptions decisions, but the OGC and the ERA later began to send subordinate staff to such meetings. Through a combination of argumentative skill and superior experience, Goldstein as chairman easily secured their agreement. Few issues were taken to the Deputy Secretary; when they were, Goldstein's persuasiveness and high standing with the Deputy Secretary almost always won the latter's assent.[137] When the motor gasoline crisis unleashed a flood of exceptions applications in the Spring of 1979, committee clearance became too cumbersome to handle the great volume of cases, most of which were routine. The OHA instead circulated draft decisions to the OGC and the ERA; objections had to be received within 48 hours or concurrence would be assumed. The high volume of OHA decisions meant that the OGC and the ERA often could not meet that deadline; indeed, the lower-level ERA staff responsible for analyzing the OHA's drafts sometimes received them after the OHA's deadline had already passed. Although the ERA or the OGC sometimes extracted an extension of time, the deadline system enhanced the OHA's leverage.

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[134] *Id.* at 3.

[135] A Delegation Order of June 18, 1975 had excepted from the concurrence requirement relatively insignificant orders, such as summary denials of applications, dismissals for failure to fill procedural requirements, "supplemental orders contemplated by the original order," and "decisions on requests for a stay of any order, regulation, ruling or other generally applicable requirement which would otherwise apply to the applicant."

[136] *See, e.g., Ashland Oil, Inc.* Nos. BEE-0373, BSG-0007 (Feb. 11, 1980)(discussed *infra* notes 233-47 and accompanying text).

[137] Interview with John O'Leary, former Deputy Secretary, DOE (May 27, 1982); interview with William Funk, Office of General Counsel, DOE (June 30, 1982).

Because the review committee mechanism sometimes failed to integrate exceptions decisions into the larger departmental policy process, the DOE did not develop systematic approaches to certain important issues traversing ERA and OHA jurisdictions, such as motor gasoline allocation and the pricing of ANS crude.[138] But even (indeed especially) when the review committee did function as an effective coordinating device, some of its procedures raised questions of procedural fairness.[139]

C. *The Exceptions Process in Action: Four Case Studies.*

The characteristic features and true significance of the exceptions process emerge most clearly in its application to specific areas of regulatory policy. In this Part, four detailed case studies are examined. The first study examines the OHA's ambitious efforts to subsidize small refiners through its so-called *Delta-Beacon* standards. These standards represent perhaps the most thoroughgoing, systematic instance of the use of "policy exceptions" in the service of a self-conscious, self-contained, and self-administered regulatory program. The second study examines the OHA's attempts to fashion "hardship" exceptions in two adjudications, the *Union* and *Ashland* cases, growing out of the Iranian oil embargo of 1978-1979. The significant policy implications and enormous relief sought in these two cases challenged the OHA's conception of the proper role for exceptions in the larger policymaking process, and called into question the adequacy of its procedures. The third study, involving the *Ohio Independents* case, raises similar questions but in a rather different policy context. The final study examines the OHA's performance during the motor gasoline crisis of 1979 and the use of an exceptions process, especially in relationship to the OHA's use of the rulemaking apparatus, under conditions of severe stress.

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[138] *See infra* notes 248-326 and accompanying text.

[139] Questions regarding OHA's refusal to disclose who was on the review committee, the committee's role in particular exceptions decisions, and the grounds upon which it altered decisions previously made were not laid to rest by a Temporary Emergency Court of Appeals (TECA) decision holding that an applicant was not prejudiced by its inability to obtain this information from the DOE. Pasco v. FEA, 525 F.2d 1391, 1404-05 (Temp. Emer. Ct. App. 1975).

1. *The* Delta-Beacon *Program.* The problem presented by the independent refining sector generally shaped the debate over the form of the entitlements program, and indeed over energy policy. As early as the MOIP, these refiners, lacking their own crude production facilities, had won some regulatory protection from normal market forces; their importance in the evolution of energy policy continued throughout the 1970s.[140]

A combination of plausible economic arguments and unusual political advantages provided the independent refiners with great influence. Several of them had refinery capacities of several hundred thousand barrels a day, but the vast majority were essentially small businesses. Their geographical dispersion among a large number of congressional districts, as well as their ideological appeal as gallant competitors against the major oil companies (which politicians did not want to appear to favor) gave them unusual political "clout" with Congress and with administrations of both parties. The Justice Department strongly supported special treatment for small refiners in order to maintain competition in the petroleum industry. These refineries often served remote communities in the West and Midwest where the major integrated companies were less active. Small refiners sometimes employed a large proportion of the population in such communities. In many areas of the Midwest, agricultural production depended upon products from small refiners, such as farmers' cooperatives. The small and independent refiners wielded enormous influence on Capitol Hill, particularly when allied with groups that had related interests, such as the independent gasoline marketers that independent refiners often supplied and the East Coast independent terminal operators that supplied New England.

According to a Brookings Institution study, protection of the independent marketers, terminal operators, and refiners from the effects of tight domestic and international markets "was *the* energy issue of 1973."[141] The powerful lobby on behalf of these groups of independents made the EPAA itself less a comprehensive measure for administering during the shortage than an effort to help the independents weather the effects of both dried-up spot markets and reduced supplies from the major integrated companies.[142] The statute generously defined "small refiner" to include all those whose total refinery capacity did not exceed 175,000 BPD.[143] This included all but the very largest independents, further testifying to the political strength of the refiners' lobby.

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[140] *See supra* notes 101-26 and accompanying text.

[141] Energy Policy, *supra* note 97, at 429.

Once the EPAA passed, an explosive political debate occurred over the development of a crude cost equalization scheme. In July 1974, a group of twenty-eight senators met with FEA Chairman John Sawhill to urge adoption of such a program in order to protect the independent sector. Members of Congress continued to lobby for the FEA in the succeeding months. The White House, fearing that support for decontrol might identify the Administration with the much-criticized major oil companies, also helped push the FEA toward an entitlements program as the most reasonable alternative.[144]

Much of the discussion at the rulemaking stage focused on the special need to assure small refiners access to crude. The Justice Department's position echoed arguments by small refiners that their reliance on "new" (uncontrolled) oil had put them at a competitive disadvantage vis-a-vis the majors.[145] The majors, of course, controverted this point, maintaining that economies of scale and the small refiners' use of outdated technology made the latter inefficient. Yet it was difficult to meet the argument that even the many small refiners with access to "old" (price-controlled) oil could not bear sudden large increases in the cost of crude if those increases would trigger entitlements purchase obligations. The Justice Department and the small refiners, arguing for a full small-refiner exemption from such obligations, eventually won small refiners a level of special benefits under the program equal to their maximum benefits under the old MOIP. Small refiners, as defined under the statutory terms, received a "small refiner bias" giving them extra entitlements under a sliding scale that awarded greater proportionate benefit as the refiner's production decreased.[146]

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[142] This purpose is revealed in the list of nine broadly worded goals of the EPAA. *See supra* note 109.

[143] 15 U.S.C. § 752(4) (1982).

[144] ENERGY POLICY, *supra* note 97, at 466-73.

[145] *See* Comments of the U.S. Dept. of Justice on Amendment of FEA Regulations to Provide for Allocation of Old Oil, Sept. 30, 1974 [hereinafter cited as Justice Dep't Comments].

[146] A refiner with an average daily throughput of 100,000 BPD, for example, received an additional $10,190 in entitlements daily, or approximately $0.10 per barrel, while a refiner with average daily volume of only 10,000 BPD received $10,028 more in entitlements daily, or approximately $1.00 per barrel. The FEA explained that this bias was "necessary to compensate relatively small refiners for higher operating costs, proportionately greater capital expenditure requirements, and the fact that such refiners must, in many cases, market their products at a lower

a. *The origins of exceptions relief for small refiners.* Although the fact was not apparent initially, the small refiner bias was only the first of a two-part subsidy of small refiners through the entitlements program. The second part, implemented through the exceptions process, soon followed. Even after the entitlements program was established on December 4, 1974,[147] FEA officials continued to worry about how to justify the level of entitlements relief in the small refiner bias to the independent refiner lobbyists and their congressional supporters. The latter two groups had advocated a full exemption from entitlements purchase obligations. Two weeks later, the FEA issued Special Rule No. 3 in an attempt to placate congressional and other advocates of small refiners. The rule sought to alleviate the "severe short-term economic impact" of entitlements purchase obligations on small refiners with higher-than-average dependence on old oil. This was to be accomplished through a gradual phase-in of their purchase obligations over a three-month period.[148]

At the same time, the FEA also announced that the OEA planned to grant exceptions relief to small refiners "in a certain number of cases," and that the OEA was "already implementing an expedited process for the program."[149] In part, Special Rule No. 3 was intended to defer the full impact of entitlements purchase obligations until the OEA could fashion exceptions relief. Unlike the Special Rule, which was limited in effect to small refiners required to purchase entitlements (that is, those with a greater than average dependence on old oil), this announcement did not indicate the eligibility standards that the OEA would apply. The FEA hoped to preserve its flexibility, while reassuring small refiners that it would not allow the entitlements program to put them out of business.

The OEA's first opportunity to grant exceptions relief to small refiners came in the *Pasco Inc.* case,[150] decided January 20, 1975. Pasco filed for relief only two days after the entitlements program was established. It had entered the petroleum industry in 1973 after a federal antitrust consent decree forced the Atlantic Richfield Company (ARCO) to divest its assets in Sinclair Oil in order to foster competition in a 14-state area.[151] In the entitlements program rulemaking, the Jus-

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price than the products of the major branded refiners." 39 Fed. Reg. 39,740, 39,741-42 (Nov. 11, 1974).

[147] 39 Fed. Reg. 42,246 (Dec. 6, 1974).

[148] 39 Fed. Reg. 43,814 (Dec. 19, 1974).

[149] *Id.*

[150] Pasco, Inc., [2 FEA] ENERGY MGMT. (CCH) ¶ 83,021 (Jan. 20, 1975).

[151] To buy Sinclair Oil, Pasco had invested all its assets and had borrowed $100 million. Pasco had also incurred substantial long-term obligations under a rapid and extensive capital

tice Department had specifically cited Pasco as an example of a small refiner with "heavy reliance on old oil" that would be injured by an entitlements purchase obligation.[152] Although antitrust considerations may have made the case sui generis, *Pasco* contained at least three elements common to the first series of small refiner exception relief cases.[153] First, relief was confined to refiners with greater than average access to old oil who thus were obliged to buy entitlements. Second, the criteria for relief eventually centered around a showing that a full purchase obligation would have a severely adverse effect on the firm—essentially a "serious hardship" standard. Finally, Pasco received relief from only a portion (52 percent) of its entitlements obligations, a benefit the OEA asserted would permit Pasco to "maintain its present market share and obtain the reasonable level of profits necessary to continue its capital improvement plans."[154]

In *Pasco* the OEA had not announced a clear standard for small refiner exceptions relief but had merely indicated a willingness to consider individual hardship flowing from entitlements obligations. By the end of January, several other small refiners had filed applications for exceptions relief and the FEA was acquiring a clear idea of what data it needed to decide cases more typical than *Pasco*. On February 10, the FEA published a notice[155] listing the information required in exceptions applications by small refiners. For small refiners that had applied for exceptions relief, the lower level of entitlements obligations that the Special Rule had allowed for all small refiners purchasing entitlements in November and December was continued pending a decision on per-

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improvements program that included refinery and pipeline expansion, improvement of marketing facilities, and programs to increase its crude production.

[152] Justice Dep't Comments, *supra* note 145, at 8. In its decision (Pasco, Inc., [2 FEA] ENERGY MGMT. (CCH) ¶ 83,021 (Jan. 20, 1975), *aff'd sub nom.* Pasco v. FEA, [1974-1980 Transfer Binder] ENERGY MGMT. (CCH) ¶ 26,025 (D. Wyo. 1975), *aff'd,* 525 F.2d 1391 (Temp. Emer. Ct. App. 1975)), the OEA found that Pasco's capital improvements program was intended in part to "meet the goals specified in the divestiture decree," and that a full purchase obligation might cause Pasco to default on its financial obligations, posing "an immediate threat to the firm's continued existence." [2 FEA] ENERGY MGMT. (CCH) at 83,054-55. To jeopardize Pasco's effort to develop into a viable competitor, the OEA reasoned, would frustrate the EPAA's purposes.

[153] The use of exceptions relief to subsidize a capital development program distinguished Pasco from most other refiners that would receive relief under the OEA's "program."

[154] Pasco, Inc., [2 FEA] ENERGY MGMT. (CCH) ¶ 83,021, at 83,057-58. When Pasco contested this limited relief in court, both the district court and the TECA affirmed the OEA's position that the EPAA contained goals other than enhancing competition, which justified requiring Pasco to "make certain sacrifices" that the entitlements program required of other refiners. *See id.* at 83,058; *see also* Pasco v. FEA, 525 F.2d 1391, 1400 (Temp. Emer. Ct. App. 1975).

[155] 40 Fed. Reg. 6197 (Feb. 10, 1975).

manent relief.[156] This provision was apparently intended to invite additional exceptions applications.[157]

The notice also explained in general terms how the OEA intended to handle these applications. The usual exceptions standards of "severe hardship or gross inequity" would be applied to each application, and relief given to refiners "severely adversely affected by the program." But relief would be confined to small refiners required to *purchase* entitlements, a limitation that echoed the earlier calls for a blanket exemption of small refiners from purchase obligations. FEA officials had opposed such an exemption, preferring the small refiner bias for two reasons. First, the exemption would extend far more relief than was economically justifiable. Second, it would distinguish arbitrarily between small refiner purchasers and sellers of entitlements. The FEA conceded that in the entitlements program's initial stages only the small refiners required to purchase entitlements would be hurt, for entitlements sellers received payments through the program. Yet once the entire industry became accustomed to the transfers under the program, it would become clear that the small refiners that sold entitlements were benefiting less from the program than the purchasers that received exceptions relief. Entitlements sellers would have to spend their benefits on more expensive "new" crude, while entitlements purchasers receiving exception relief would enjoy the benefits of access to cheaper "old" oil without incurring any offsetting program obligations. As crude costs climbed during the late 1970's, the FEA's fears were realized. Exceptions relief to purchasers would secure them against financial loss, while other small refiners, differing only in their lower than average access to old oil, were exposed to fierce market pressures or compelled to apply for exceptions relief under the much stricter "serious hardship" standard.

b. *Development of the* Delta-Beacon *standards.* In the first months after the February 10 notice, the OEA decided several small-refiner cases. These decisions indicate no uniformly applied standard for relief, nor any uniform method of calculating the appropriate level of relief. In general, the applicant's data must demonstrate a financial harm absent relief from entitlements purchase obligations, so severe as to threaten the firm's survival. Mohawk Petroleum Company,[158] which received one of the first small refiner exceptions after *Pasco*, was an example. In *Mohawk Petroleum Co.*, OEA found that a combination of the regulatory restrictions on diesel prices, the competitive market situation in other fuels, and a contractual agreement the company had reached concerning pricing for residual fuel oil would prevent the company from passing its entitlements costs on through higher prices. Although the company had generally been profitable, a full purchase obligation would threaten its "commercial viability."[159]

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[156] *Id.* at 6198.

[157] The notice observed that the OEA had so far received "relatively few" applications from small refiners, "due perhaps to the complexities inherent in the startup phase of the program and the difficulties in drafting the necessary applications." *Id.* at 6199.

[158] [2 FEA] ENERGY MGMT. (CCH) ¶ 83,049 (Feb. 24, 1975).

Despite the general strictness of the standard, the various criteria cited to demonstrate financial hardship in the early cases facilitated the granting of relief. *Mohawk*, for example, found evidence of the required hardship in effects upon working capital and monthly earnings. *Beacon Oil Co.*[160] found it in effects upon operating profit and operating income. In denying exception relief in *Navajo Refining Co.*,[161] the OEA focused largely on the company's projected net income level and the level of profits in absolute dollars. Finally, in *Edgington Oil Co.*,[162] the denial was based upon a comparison of the company's projected profit margin after entitlements payments with its profit margins over the past five years. In none of these cases did the OEA explicitly establish criteria for hardship, and the decisions made few citations to each other except to assert the general hardship standard. The OEA was experimenting. Different OEA analysts were assigned to different decisions and each was permitted to develop the approach he or she thought best. Refiners also submitted data in different forms, further impeding consistent treatment.

In *Pasco*, the OEA had described its method of calculating the appropriate level of relief in an unpublished attachment, and this question received only cryptic treatment in decisions such as *Mohawk* and *Beacon*.[163] Toward the end of the initial round of small-refiners exceptions relief cases at the end of March, OEA decisions increasingly focused on a comparison of historic and projected profit margins of applicants to calculate the appropriate level of relief, although they sometimes deviated from this test.[164]

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[159] Mohawk Petroleum Co., [2 FEA] ENERGY MGMT. (CCH) ¶ 83,049, at 83,135 (Feb. 24, 1975). The strict standard of hardship applied in such cases, however, resulted in denials of relief in several other cases. *See, e.g.,* Edgington Oil Co., [2 FEA] ENERGY MGMT. (CCH) ¶ 83,065 (Mar. 12, 1975).

[160] Beacon Oil Co., [2 FEA] ENERGY MGMT. (CCH) ¶ 83,060 (Mar. 12, 1975).

[161] Navajo Ref. Co., [2 FEA] ENERGY MGMT. (CCH) ¶ 83,069 (Mar. 12, 1975).

[162] Edgington Oil Co., [2 FEA] ENERGY MGMT. (CCH) ¶ 83,065 (Mar. 12, 1975).

[163] In *Beacon*, [2 FEA] ENERGY MGMT. (CCH) ¶ 83,060 (Mar. 12, 1975), its only explanation for granting 71% entitlements relief was that the figure was "[b]ased upon the financial data which Beacon has submitted relating to the firm's working capital position, operating profitability and cash flow." *Id.* at 83,173. *Mohawk*, [2 FEA] ENERGY MGMT. (CCH) ¶ 83,049 (Feb. 24, 1975), indicated that relief amounting to 63% of entitlements obligations would allow the company to attain a 1975 profit margin that "approximated" its profit margins over the past four years. *Id.* at 83,135-36. But the actual calculation of relief was based on various factors, including "the firm's historic return on equity, return on capital investment, working capital position, profitability, and cash flow." *Id.* at 83,135. Generally, these decisions did not explain how the OEA calculated relief as much as they demonstrated that a hardship existed, and that the OEA was determined to fulfill its statutory obligation to aid small refiners.

The FEA mailed to all 300 refiners in the entitlements program copies of a notice that it had published in the Federal Register proposing alternative standards for relief based on different measures of profitability, requesting comments on the proposals within approximately three weeks.[165] Although it held a hearing, the broad notice and the request for comments suggest that the FEA was essentially conducting a rulemaking process. Yet the FEA was evidently anxious to avoid adopting a formal rule at this stage, because that would transfer responsibility for administering the standards that the OEA had developed to another agency within the FEA while leaving the OEA to adjudicate exceptions to those standards. The FEA preferred to leave administration of the entire program of small refiner entitlements exceptions with the OEA, which had already developed experience in the area. Because only a relatively small number of companies—no more than twenty at this time—might qualify for exceptions relief, this would not over burden the OEA. Leaving development, as well as adjudication, of the standards to the OEA would also allow it maximum freedom to refine them further and to apply them flexibly in individual cases. Finally, Goldstein's aggressive pursuit of bureaucratic "turf" for the OEA supported keeping these standards as adjudicative grounds of decision rather than as formal rules.[166]

In the first of the next round of exceptions cases, *Delta Refining Co.*,[167] the OEA announced the standard that it had adopted in response to the comments received. The OEA agreed with those firms that preferred an alternative to the historic profit margin test, a standard based on return on invested capital rather than one based on return on stockholders' equity: year-to-year shifts in the ratio of debt financing to equity might distort the latter standard, but a comparison based on the former would achieve greater consistency.[168] Application of this new "*Delta* standard" contributed to denial of relief to Delta and several other firms, but some initial grants were made for three months, until October 31, 1975. The OEA then extended this relief to the end of 1975 in a single decision covering thirteen refiners, the majority of those that had been awarded *Delta* relief.[169]

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[164] *See, e.g.,* Delta Ref. Co., [2 FEA] Energy Mgmt. (CCH) ¶ 83,078 (Mar. 28, 1975); Charter Oil Co., [2 FEA] Energy Mgmt. (CCH) ¶ 83,077 (Mar. 27, 1975).

[165] On August 4, the FEA had published a notice that, reflecting the predominant use of historic profit margins in previous cases, assigned that criterion—more specifically, the average profit margin realized by a firm during the previous seven years—the status of a standard for relief. Despite past practice, however, the FEA felt that a test based exclusively on historic profit margins could, in the current period of rising crude and product prices, lead to calculations that failed to represent the true level of relief needed by some small refiners. As an additional standard, then, the FEA proposed either the firm's return on invested capital or its return on stockholders' equity. The level of exceptions relief granted would be based on the lesser of the historic profit margin on the two alternative standards the FEA adopted, unless the firm established that strict application of these criteria would not alleviate a serious hardship or gross inequity caused by the entitlements program. 40 Fed. Reg. 33,489 (Aug. 8, 1975).

[166] Interview with John Hill, former FEA Assistant Administrator (July 29, 1982).

[167] [2 FEA] Energy Mgmt. (CCH) ¶ 83,275 (Sept. 11, 1975).

By the end of 1975, exceptions relief for small refiners had systematically been transformed into a full-fledged subsidy program with clearly stated, legislative-type criteria and a clearly defined constituency. Drawing upon a procedure strikingly similar to informal rulemaking under the APA, the OEA had crystallized and shaped its precedents into an explicit standard that would govern future adjudications of exceptions relief for small refiners. Developing the standard for exceptions relief through case-by-case adjudication had allowed the FEA great flexibility. At the outset, it had not been clear whether any particular standard would be appropriate, much less what such a standard should be. In this way, the FEA remained free to respond specifically to extreme cases in which entitlements obligations might force firms out of business. Adjudication allowed exceptions analysts to experiment with different ways of approaching individual cases. Out of this experimentation, a body of principles emerged that the OEA eventually adopted in rule-like form as the *Delta* standards. Thereafter, the individualized nature of exceptions proceedings would permit application of these standards in individual cases.[170]

c. *Adjustment of* Delta *relief.* By developing the *Delta* standards as it did, OEA created two kinds of problems. It sometimes applied standards that led to inconsistent treatment of different companies and that were also inconsistently applied to individual companies over time.[171] In addition, the *Delta* standard itself clearly dictated a change in the nature and quantity of relief to small refiners from that originally granted.

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[168] The August 4 notice had also proposed that the FEA consider only data from petroleum refining and marketing operations in calculating what level of relief, if any, was appropriate. By eliminating data concerning crude production operations, this would avoid distorting "the financial position of the firm when viewed as a refiner," furthering the purpose of the entitlements program to reduce crude cost disparities. The FEA adopted this approach. 40 Fed. Reg. 33,489, 33,490 (1975).

[169] Famariss Oil Corp., [2 FEA] ENERGY MGMT. (CCH) ¶ 83,356 (Nov. 7, 1975). The decision also adjusted the relief for each of the companies to account for recent changes in the National Old Oil Supply Ratio and the cost of entitlements.

[170] A court challenge to this program of relief foundered upon the usual rocks: the FEA's broad authority, the energy "emergency," and the "temporary" nature of the entitlements program. Cities Serv. v. FEA, 529 F.2d 1016, 1028 (Temp. Emer. Ct. App. 1975), *cert. denied,* 426 U.S. 947 (1976).

The OEA addressed these problems in two principal ways. First, it granted relief on the basis of its most recent standard whenever a company appealed an exceptions decision on the ground of inconsistency.[172] This technique, however, could secure consistency only for those refiners that took the trouble to appeal. To assure adjustment of relief for all companies, the OEA in 1976 began a year-end review that utilized both actual (rather than projected) figures and the latest standard. The adoption of the *Delta* standards had resulted in a different method of calculation of relief for all small refiners starting in September 1975, and the notice that proposed the *Delta* standards had treated them as superseding the criteria developed in the earlier cases. Consequently, the OEA proposed in the notice to use the *Delta* standards to consider afresh whether the relief granted earlier to small refiners had been insufficient or excessive.[173]

In the spring of 1976, the OEA notified affected companies of the review and requested detailed financial information.[174] On August 30, it published a preliminary analysis and proposed adjustments for each refiner in the form of additional obligations to buy or opportunities to sell entitlements.[175] On November 5, the OEA issued a supplemental order[176] making final adjustments simultaneously for the entire class of twenty-six small refiners that had received exceptions relief in 1975.[177]

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[171] *See supra* notes 160-64 and accompanying text.

[172] Navajo Ref. Co., [2 FEA] ENERGY MGMT. (CCH) ¶ 80,581 (May 2, 1975), presented such an appeal. The company claimed, inter alia, that the OEA had based its denial in part on calculations of profit margins as absolute dollar amounts, while in subsequent cases the OEA has calculated profit margins as a percentage of sales. In the decision on appeal, the OEA conceded that it had applied standards to Navajo that differed from those it applied subsequently. Using the latter method to calculate the company's profit margin and incorporating new materials submitted by Navajo, the OEA granted partial relief. *See also* OKC Corp., [2 FEA] ENERGY MGMT. (CCH) ¶ 80,850 (June 6, 1975).

[173] 40 Fed. Reg. 33,490 (Aug. 8, 1975). Because the OEA had originally granted all exceptions based on firms' projections of their financial and market performance, and because refiners might distort their financial projections to obtain greater relief, a reevaluation on the basis of actual financial results would have been necessary even if the OEA had applied the *Delta* standards consistently throughout 1975.

[174] *See* Delta Ref. Co. v. FEA, 559 F.2d 1190, 1193 (Temp. Emer. Ct. App. 1977).

[175] 41 Fed. Reg. 36,540 (Aug. 30, 1976).

[176] Beacon Oil Co., [4 FEA] ENERGY MGMT. (CCH) ¶ 87,024 (Nov. 5, 1976). Supplemental orders, although not provided in the OEA regulations, were often used to modify prior orders, on the OEA's own initiative rather than that of any firm.

[177] OEA added to or subtracted from the entitlements obligations in 1976 for all but two of the refiners. Husky Oil and Powerine successfully maintained that they should not be subject to

This first year-end adjustment was challenged in court as a "retroactive recapture program" of which the FEA had failed to provide legally required notice to affected parties. The Temporary Emergency Court of Appeals decision upholding the OEA's practice, although predictable, seems highly questionable.[178] The OEA's review, after all, did not simply update from projected to actual data but applied substantively different standards to that data. During the earlier proceedings, the FEA had never hinted that adjustment of relief would be based upon new standards. The court, however, simply ignored this problem, applying the extremely deferential standard of judicial review typical in DOE exceptions cases.

In addition to enforcing inconsistent standards, the amount of time required for the OEA to develop and apply the standards created problems. Frequent readjustments of relief were necessary in response to changes in the entitlements program. The *Navajo Refining* case illustrates how the OEA attempted to incorporate such changes into its analysis. On the very day that the OEA denied exceptions relief in *Navajo*, the ERA had increased the cost of each entitlement from $5 to $6 to reflect rises in crude prices. When Navajo appealed, it contended that this increase made relief appropriate, and the OEA used the new price of entitlements in granting partial relief on appeal.[179] Because all companies receiving exceptions before the entitlements price increase had made similar claims, the OEA had to issue a supplemental order recalculating the amount of relief for each firm.[180]

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retroactive application of the *Delta* standards, because they neither received relief nor applied for such relief again after the OEA began application of the new standards. The OEA found that it could rightfully apply the new standards to all 1975 exception relief granted the other refiners, because those companies had "voluntarily brought themselves under the standards" and had "accepted the benefits conferred upon them as a result of the application of those standards." [4 FEA] ENERGY MGMT. (CCH) ¶ 87,024, at 87,078.

[178] The TECA rejected the retroactivity argument, pointing to the following disclaimer included in every decision and order granting exception relief: "This exception is based upon the presumed validity of statements, allegations and documentary material submitted by the applicant. It may be revoked or modified at any time upon a determination that the factual basis underlying the exception application is incorrect." Delta Ref. Co. v. FEA, 559 F.2d 1190, 1192 (Temp. Emer. Ct. App. 1977). The court also noted that certain decisions and orders issued in late 1975 (although not the one challenged) had given specific notice of a year-end review. *Id.*

[179] *See* Navajo Ref. Co., [2 FEA] ENERGY MGMT. (CCH) ¶ 80,581 (May 2, 1975); Supplemental Order, [2 FEA] ENERGY MGMT. (CCH) ¶ 87,009 (June 4, 1975).

[180] *See, e.g., Navajo*, [2 FEA] ENERGY MGMT. (CCH) ¶ 87,009 (June 4, 1975). Because the OEA extended previously granted relief every three months, it used these opportunities to adjust for changes in the entitlements program. The final extension of relief to 13 companies in October 1975 provided adjustments to reflect a further increase in the price of entitlements to $7.31 and also a shift in the National Old Oil Supply Ratio that dictated whether a refiner would be obligated to buy or permitted to sell entitlements. *See Navajo*, [2 FEA] ENERGY MGMT. (CCH) ¶ 83,356 (Nov. 7, 1975).

d. *Congressional influences.* In 1975, the small refiners, having failed to persuade the energy agency to grant an exemption from the entitlements program, directed their efforts toward legislation. They maintained that not even the small refiner bias, and *Delta-Beacon* exceptions relief, had wholly lifted the burden of the entitlements program from small refiners as a group. In particular, exceptions relief required a showing of severe adverse effect, and relief was only partial. In June 1975, for example, 34 small refiners had to pay almost $30 million in entitlements, while 11 large oil companies were able to sell over $62 million in entitlements.[181] Such statistics, combined with skillful lobbying, persuaded Congress to amend the pending EPCA legislation to exempt refiners with a capacity of up to 100,000 BPD from all entitlement purchase requirements for their first 50,000 BPD. Congressional leaders in the energy field joined the FEA in denouncing the exemption as an unwarranted subsidy to small entitlements purchasers that would create economic distortions rather than aid the industry.[182] Their criticisms fell on deaf ears; the amendment passed both houses by large margins.

In the conference committee, however, opponents of the amendment fashioned a compromise provision that would allow the FEA to nullify the exemption by rule, subject to a one-house congressional veto.[183] Shortly after the exemption took effect, the FEA proposed a rule to revoke it.[184] Evidence submitted during the rulemaking largely confirmed the FEA's view. Outlets of exempted small refiners were consistently undercutting the prices at other stations and increasing their market shares. Nonexempt refiners, especially those small refiners that sold entitlements and so were not eligible for the exemption, complained of competitive disadvantage. The exemption also was encouraging refiners to keep capacity and production at a level low enough to qualify for the exemption.

Because change in the exemption was subject to congressional veto, however, the FEA could not revoke it without mollifying the small refiners. As a concession, the FEA increased the level of the small refiner bias, pointing not only to the congressional will embodied in the exemption but to the large number of small refiners now seeking exceptions relief in the absence of the exemption, and to the strict standards for relief applied to entitlements sellers not eligible for *Delta* relief.[185] This compromise sufficed. On May 27, 1976, the exemption expired. Although an increased small-refiner bias had been the FEA's most valuable bargaining chip, the availability of additional exceptions relief under the *Delta* standards played an important role in helping to appease the small-refiner lobby. In announcing that the exemption would expire, the FEA extended the period of the exceptions' effectiveness to six months.[186] And as the new *Beacon Oil Co.* decision made clear, exceptions relief to any small refiner that applied was now governed by the unequivocal rule promulgated in the 1975 *Delta* decision.[187]

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[181] H.R. Rep. No. 340, 94th Cong., 1st. Sess. 47 (1975).

[182] Interview with David Schooler, staff official for House Energy and Commerce Committee (June 7, 1982).

[183] Energy Policy and Conservation Act, § 551, 89 Stat. 871, 965 (1975)(amending § 4 of EPAA)(codified at 42 U.S.C. § 6421 (1976).

[184] *See* Energy Policy and Conservation Act, § 403, 89 Stat. 871, 948 (1975)(codified at 15 U.S.C. § 753 (1982)(creating the exemption); 41 Fed. Reg. 20,392 (May 18, 1976)(proposed rule revoking the exemption).

A second congressional effort to influence the exceptions process concerned the exceptions office's procedures rather than its substantive policies. The Energy Conservation and Production Act (ECPA), enacted shortly after the *Beacon* decision, required the office, within ninety days of enactment, to "establish criteria and guidelines by which . . . special hardship, inequity, or unfair distribution of burdens shall be evaluated," and to then specify its criteria in each exceptions decision.[188] Had these requirements been in effect earlier, some of the office's important small-refiners decisions, such as its cryptic explanation of its method of calculating relief in cases like *Mohawk*,[189] would have been called into question. But by the time the ECPA passed, the *Delta* standards for relief had already evolved into fairly clearcut rules and the new requirements had little effect on how the standards were applied.

The ECPA's other requirement—that the exceptions office publish criteria and guidelines for its decisions—appeared to call for the office to reevaluate and codify its standards. But the guidelines that it published sought only "to provide potential applicants with a general understanding of the grounds on which relief has been accorded to previous applicants."[190] These guidelines explained the *Delta* standard in a single sentence: "As set forth in the Delta Decision, the FEA will generally grant exception relief to small refiners required to purchase entitlements so as to alleviate the adverse impact of the Entitlements Program which would otherwise prevent a firm from achieving the lesser of its historical profit margin or return on invested capital."[191] This brief statement, of course, excluded many elements of the standard. It failed to mention the seven-year test period, the kinds of relevant data, accounting requirements, the duration of *Delta* exceptions, and the conditioning of relief on year-end review. The exceptions office thus managed to satisfy the statutory requirement, in form if not in substance, while retaining its freedom to modify crucial aspects of the standards in individual cases.

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[185] *See* 41 Fed. Reg. 20,392 (May 18, 1976).

[186] *Id.* at 20,394.

[187] The only substantive development of the standard during the year and a half following *Beacon Oil Co.* was the explicit statement of the limitation of relief to the total amount of the refiner's entitlements purchase obligation, which the agency said had always been an implicit part of the standards for relief. Another decision during this time described stringent standards for retroactive *Delta* relief for a refiner that had revised its projections.

[188] Energy Conservation and Production Act § 104, 90 Stat. 1125. 1128 (1976)(codified at 15 U.S.C. § 766(b) (1982)).

[189] *See supra* notes 157-59 and accompanying text.

[190] 41 Fed. Reg. 50,856 (Nov. 18, 1976).

By the end of 1976, then, the energy agency had succeeded in deflecting even the most minimal congressional challenges both to the substantive small-refiner policy developed by the *Delta-Beacon* standard and to the exceptions office's sometimes erratic application of them. Until the motor gasoline crisis of 1979, the exceptions process in general, and its policy toward small refiners in particular, would remain essentially immune from congressional influence.

e. *Efforts to curtail relief.* As the price of entitlements rose and the proportion of price-controlled oil processed by refiners decreased in the late 1970's, the level of *Delta-Beacon* relief increased steadily.[192] In part, this expansion reflected more permissive substantive standards for relief. Decisions seldom referred any longer to the "serious hardship" created by entitlements purchase obligations upon firms' competitive viability, originally a prerequisite for relief. The *Delta-Beacon* criteria still purported to measure competitive disadvantage, but the exceptions office granted extended relief to firms whose disadvantage could not have qualified them under the earlier standard. In addition, small refiners were given an incentive to design their financial statistics to justify greater relief.[193] Indeed, as small refiners became more sophisticated in manipulating the standards, these practices spread. In late 1977, the ERA issued a notice (written at the OHA) asserting that small refiners had taken "unwarranted advantage" of the exceptions process and announcing immediate implementation of revised standards to deal with these and other abuses.[194]

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[191] *Id.* at 50,859.

[192] *Delta-Beacon* relief accounted for an estimated $300 million of the $2 billion transferred under the entitlements program annually by 1980; the number of refiners that had received exceptions relief by the end of the program in 1981 totalled 36. Burt & Watts-Fitzgerald, *The Crude Oil Entitlements Program*, in PETROLEUM REGULATION HANDBOOK, *supra* note 97, at 146, 155-56.

[193] For example, the DOE found that some firms owning price-controlled oil had entered into processing agreements under which other refiners processed the oil and enabled the owners to evade entitlements purchase obligations. Other processing agreements routed controlled oil from refiners subject to the full entitlements obligation to refiners guaranteed lower processing costs because of *Delta* relief. Small refiners also sometimes purchased and resold crude without processing it in order to establish a higher base upon which to calculate their profit margins. 42 Fed. Reg. 64,406 (Dec. 23, 1977).

These limitations on *Delta-Beacon* relief were the first of a series that the OHA was to adopt in an effort to prevent small refiners from using the program to gain competitive advantages. The OHA developed these refinements with a speed and flexibility far superior to the ERA's when the ERA acted in the same area. At no time, however, did the OHA's ad hoc adjustments cause it to address more fundamental questions about its program, such as its distinction between entitlements purchasers and sellers, the size of the subsidies it granted, and the economic distortions they generated.

Indeed, these changes created yet another problem: retroactivity. Two days before these first limitations were announced, the OHA adopted and applied them in four proposed exceptions decisions concerning relief for the October through December period.[195] The OHA considered them prospective, because they extended to a period for which the OHA had not yet extended relief, due to the normal two-month delay in the issuance of entitlements. The refiners, however, had already planned and largely implemented their operations for those months, raising a problem similar to the "retroactive recapture" that had arisen in connection with the 1975 year-end review.[196] The courts and the FERC found the OHA's approach invalid.[197]

Such criticism reflected the growing implausibility of the OHA's perennial "emergency" justification. In its next set of *Delta-Beacon* changes, which began at the end of 1978, the OHA was more cautious in adjudicatory retroactivity. One change sought to eliminate the effect of less profitable resale operations on firms' profit margins, the basis for calculating relief levels.[198] Although this had been previously announced, its implementation was quite belated. A second, more far-reaching change revised the 1975 ceiling on *Delta-Beacon* relief downward to reflect the substantial decline between 1975 and 1978 in the percentage of price-controlled crude being refined; retaining the old ceiling would therefore confer excessive benefits upon recipients of exceptions relief.[199] This "*Warrior* adjustment" (named after the case in which it was formulated) amounted to an admission by the OHA that its standard had nurtured the continued and unjustified growth of *Delta-Beacon* relief. Moreover, it quickly became clear that the OHA's new adjustment formula was itself problematic. The OHA initiated an interlocutory proceeding to consider how best to revise the ceiling. Once again dispensing with *Federal Register* notice, the OHA invited the eight firms that had filed objections to the original *Warrior* adjustment, as well as others that had participated in earlier exceptions cases under the program, to participate in a hearing,[200] after which the OHA issued an interlocutory order adopting a new ceiling that became the basis for adjustments in other related cases.[201]

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[194] *Id.*

[195] Lunday-Thagard Oil Co., Proposed Decision and Order, Case No. DXE-0076 (Dec. 20, 1977); Young Ref. Corp., Proposed Decision and Order, Case No. DXE-0084 (Dec. 20, 1977); Kern County Ref., Inc., Proposed Decision and Order, Case No. DXE-0088 (Dec. 20, 1977); San Joaquin Ref. Co., Proposed Decision and Order, Case No. DXE-0095 (Dec. 20, 1977).

[196] *See supra* note 178 and accompanying text. One firm, Lunday-Thagard Oil Company, even obtained a preliminary injunction against application of the new limitations on the grounds that the revised standard was a new "rule, or an order having the effect of a rule" adopted in violation of the APA and the DOE Act requirements, and applied to the firm retroactively. Thagard Oil Co. v. Schlesinger, CV78-1159-11 (C.D. Cal. 1978), Transcript of Hearing, April 24, 1978, at 10, 19; *see* Proposed Order of Presiding Officer Affirming the Contested Decision and Order, Lunday-Thagard Oil Co., No. RA79-19, 10 FEDERAL ENERGY REGULATION COMM. (CCH) ¶ 62,007 (Jan. 4, 1980).

[197] Thagard Oil Co. v. Schlesinger, No. CV78-1159-11 (C.D. Cal. 1978), Transcript of Hearing, April 24, 1978, at 10, 19.

These refinements of the *Delta-Beacon* standards reflect both the strengths and weaknesses of the OHA's administration of the exceptions process. As OHA analysts became more experienced and sophisticated in discerning how the industry manipulated its standards, they could use the informal, case-by-case process to rectify these practices with relative ease. On the other hand, OHA policymaking was incremental and spasmodic, slowly evolving in response to particular criticisms or patterns in particular cases. This incremental policymaking is probably inevitable and perhaps even desirable. Still, abuses sometimes continued for months or even years after the need for change should have been apparent. In defense of the OHA, one must add, the ERA's record in reforming its rules in this area was far worse. For years, criticism of the ERA-administered small-refiners bias had paralleled complaints about the OHA's *Delta-Beacon* standards, yet the ERA did not reduce the bias significantly until 1979. Even this change failed to eliminate the economic distortions created by the bias; the tiny, inefficient "teapot refineries" that the over-generous bias had spawned continued to prosper throughout the period of controls.[202] Moreover, the ERA's failure to devise a rule preventing the abuse of processing agreements was so abject that the OHA, despairing that the ERA would ever deal with the problem by rule, felt obliged to exclude processing agreements from the *Delta-Beacon* calculations.[203]

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[198] *See, e.g.*, Warrior Asphalt Co., Proposed Decision and Order, Case No. DXE-1891 (Sept. 27, 1978), at 4.

[199] *Id.*; *see also* Navajo Ref. Co., [3 DOE] ENERGY MGMT. (CCH) ¶ 81,141 (May 16, 1979).

[200] *See* Warrior Asphalt Co., [3 DOE] ENERGY MGMT. (CCH) ¶ 82,549, at 85,164 (Mar. 13, 1979).

[201] *Id.*

The OHA's most fundamental weakness, however, was its failure to reexamine systematically and thoroughly the basic policy assumptions undergirding the *Delta-Beacon* standards. For example, disparities in the cost of uncontrolled crude created financial problems for sellers of entitlements who were not covered by the OHA's standards as well as for buyers who were covered. The governing statute did not call for such a distinction and the ERA's rules generally avoided making it. The OHA did not closely analyze the broad implications of granting relief to one set of small refiners and denying it to others who may have been, on balance, similarly situated.[204] Similarly, under the *Delta-Beacon* standards, the OHA allowed the "gross inequity" criterion to become so elastic that enormous subsidies were sometimes granted and continued without a convincing showing of "serious hardship" or economic justification.[205]

f. *Conclusion.* The evolution of the *Delta-Beacon* standards reveals some important, more or less systematic themes surrounding the use of the exceptions process in energy regulation. First, the exceptions process functioned as an important palliative, complementing and sometimes substituting for a rulemaking process that could be (and in the energy agencies increasingly was) cumbersome and glacial. Through the OHA's adjudicatory format, a crucial subsidy program was established swiftly and its standards were gradually and flexibly refined as patterns of abuse became evident. Second, an exceptions process whose decisions would have far-reaching policy consequences had to find some way to elicit the broad participation and broad-gauged policy analysis associated (in principle) with informal rulemaking if those decisions were to be both legitimate and sound. In the *Delta-Beacon* program, the OHA managed to devise hybrid notice-and-comment procedures that sometimes, although not always, fulfilled this need. Third, when an agency undertakes to develop and administer a complex, affirmative regulatory program through an exceptions process, it probably magnifies certain risks already inherent in that task: over-broad classifications, unrepresentative data, evasion by regulated firms, and unanticipated consequences. The OHA's development of the *Delta-Beacon* standards, piecemeal, ad hoc, and often reactive, realized all of these risks at one point or another.

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[202] *See, e.g., Forecast for the Refining Industry—A 100% Chance of Political Chaos*, 12 NAT'L J. 597, 599 (1980).

[203] Interview with Doris Dewton, former ERA Deputy Administrator (June 29, 1982).

[204] A few small entitlements sellers who could not obtain crude because of the cost disparity did receive exceptions relief under the stringent "serious hardship" standards. *See, e.g.,* Asamera Oil (U.S.) Inc., Washington, D.C., Case No. BEL-1491, [6 DOE] ENERGY MGMT. (CCH) ¶ 81,311 (Oct. 16, 1980). Most such sellers, however, did not.

[205] Only in the *Little America Refining Co.* case, in which the OHA found that the company had used investments funded by *Delta-Beacon* relief to build itself into a dominant marketing force in its region, [3 DOE] ENERGY MGMT. (CCH) ¶ 81,012 (Jan. 12, 1979), and in a similar case, Charter Oil Co., [4 DOE] ENERGY MGMT. (CCH) ¶ 81,080 (July 27, 1979), did the OHA completely terminate relief to a firm that otherwise met the standard. Indeed, one such company received more than $100 million in *Delta-Beacon* relief during 1978-1979 alone, telephone interview with Joseph Bell, Dec. 17, 1983, while another received $153 million in the period 1978-1980 and $6 million more for the single month of January 1981, Husky Oil Co., Case No. BEX-0210 (May 11, 1981).

Fourth, an exceptions process can be difficult for Congress and the courts to influence except at the level of the broadest and least effective kinds of procedural controls. In the case of the *Delta-Beacon* program, congressional reluctance to intervene in particular adjudications left the OHA with great autonomy. But even when Congress adopted a statutory mandate to articulate and codify its standards, the OHA easily deflected it. The courts, deferring to the OHA's expertise and emergency responsibilities, exercised only the most limited influence. Finally, the OHA's effort to use the exceptions process to develop broad policy through case-by-case adjudications, even when aided by wider participation, tends to foster a narrow, incremental perspective in which fundamental policy questions continue unaddressed for long periods of time, perhaps until after the policy has become so well entrenched that those questions seem politically or programmatically irrelevant.

2. *The Iranian Oil Embargo: The* Union *and* Ashland *Cases.* During the nine months that followed the waning of the motor gasoline crisis in the fall of 1979, the OHA decided two extremely controversial exceptions cases: *Union Oil Co.*[206] and *Ashland Oil Co.*[207] The enormous size of both companies involved, and the potential effects of the decisions on the industry and public, made the stakes unusually high. Both cases posed an extremely difficult test for the integrity of the regulatory process at the DOE. Both cases also reveal certain fundamental dilemmas inherent in the use of the exceptions process to formulate broad-gauged policy and to provide large-scale relief.

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[206] *See* Proposed Decision and Order, Union Oil Co. (Aug. 31, 1979), at 15.

[207] *See* Transcript, *In re* Ashland Oil, No. BEE-0373, at 260-64 (Nov. 27, 1979).

a. Union: *The exception preempts the rule.* Central to the issues in *Union* (and *Ashland* as well) was the sudden and pronounced disparity that appeared in 1979 between the world price of "contract" crude oil and the world price in the spot market. Prior to 1979, foreign crude had been readily available under contract and the spot markets for crude had been relatively small, and the spot market prices and contract prices tended to converge. The regulations had treated both categories of imported crude alike, lumping them together in an average price for all uncontrolled crude; with convergent spot market and contract prices, this treatment had no appreciable discriminatory effect.

The Iranian revolution, which blocked crude exports to the United States and other western countries from December 26, 1978 through March 5, 1979, severed the close relationship between spot and contract prices. The mild shortage that developed, exacerbated by uncertainty as to when Iran would resume exports, encouraged aggressive bidding by firms and importing nations in the worldwide spot market. Some exporting countries deliberately cut back or terminated their contracts in order to sell their crude in the more profitable spot market. Spot market prices escalated rapidly.[208]

The resulting price movements had a severe impact on Union Oil, a large integrated company. Union claimed to have lost 53,000 BPD of contract crude from January through August 1979 due to Iranian cutbacks and reductions or cancellations of contracts by oil exporting nations and multinational oil companies. This loss forced Union into the spot market to an inordinate extent.[209] During the 22 weeks from April through August 1979, Union paid higher prices for foreign crude than any other American refiner for eight weeks, and paid one of the three highest prices for 14 weeks. As a result, Union's crude acquisition costs, which had averaged no more than $0.29 per barrel above the industry average for the years 1975-1978, climbed (after adjustments under the entitlements program) to $5.67 per barrel (or over twenty percent) above the industry average by July 1979. For the third quarter of 1979, Union estimated that its retail gasoline prices averaged six cents per gallon higher than those charged by its competitors.[210]

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[208] According to some reports, the proportion of foreign crude that American firms purchased on the spot market increased from five percent of the total in 1978 to almost 15% in September 1979. By June 1979, spot market prices had risen to $12 to $18 above contract prices posted by OPEC, depending on the grade and source of the crude; two months later, the spot market price remained as much as $12 higher. Between the weeks of March 29 and July 12, 1979, for example, American refiners reported spot market prices climbing 70%, from as much as $22 per barrel to a high of $38.50. The average acquisition cost for domestic refiners (before entitlements program adjustments) rose almost 50% from $12.45 per barrel in July 1978 to $18.58 per barrel in July 1979. *See* Proposed Decision and Order, Union Oil Co. (Aug. 31, 1979) at 15.

[209] The ratio of its spot market purchases to its total crude imports jumped from 16% to 62% between the first and third quarters of 1979, although the industry average only rose from 5% to 15%.

Arguably, Union's injury was especially self-inflicted. First, it had adopted a long-term strategy of relying upon the spot market for its foreign crude supplies. Even before 1979, Union had relied on the spot market for 11 to 12 percent of its supply of crude oil, more than twice the industry average. This strategy had been based on two premises: stable market conditions and a spot market price that fell below the contract price for extended periods.[211]

Second, Union's demand for crude had been intensified by its high utilization of refining capacity.[212] This higher utilization probably reflected its aggressive expansion, which substantially increased its share of the national gasoline market.[213] Union needed additional crude to retain this larger market share. Any claim of "serious hardship" would be further undercut by its fourteen percent increase in net profits between the third quarter of 1978 and the same period in 1979, producing a return that, although below that enjoyed by the largest American oil companies, was substantial nonetheless.[214]

For these reasons, Union sought exceptions relief by invoking the "gross inequity" and "unfair distribution of burdens" standards, which required it to show only that the regulatory program burdened Union more than other similarly situated refiners. Union emphasized that the entitlements regulations both deprived it of benefits from its access to "old" crude and failed to take account of its unusually high cost of spot market foreign crude.[215] Union's application alleged that its obligations to sell substantial volumes to other refiners under the buy-sell program further aggravated its cost disadvantage; it had to sell at contract prices despite its lack of immediate access to low-cost domestic crude. Union claimed that these regulations compelled it to choose between buying high-priced crude at a cost it could not pass through to its customers and curtailing its operations. If Union chose the latter, its customers would suffer either continued high retail prices or reduced supplies. Union therefore requested that the OHA grant sufficient relief from its entitlements obligations to bring its weighted average cost of imported crude into parity with that of the industry.

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[210] Application for Exception, Union Oil Co. (Aug. 31, 1979), at 15.

[211] The strategy may also have been encouraged in early 1979 when DOE officials, fearful that the Iranian situation would produce a continued shortage of refined products, actually exhorted refiners to enter the spot market to replenish their supplies of crude. Proposed Decision and Order, *Union Oil Co.* at 13, 41.

[212] For example, in July 1979, while the industry's average utilization rate was 97.98%, Union ran its refineries at 98.75%. In August, when the national average dropped to 86.52%, Union ran at 94.02%.

[213] Its share grew by an average of 18% from the first half of 1978 through the corresponding period in 1979, compared to an average increase of 5% during the same period among the 21 largest integrated American refiners.

[214] Proposed Decision and Order, *Union Oil Co.* at 40.

[215] Union Oil, Application for Exception, at 1.

(i). *The temporary exceptions proceeding.* Along with its exception application, Union submitted an application for temporary relief. The company claimed that without such relief it must immediately decide whether to charge noncompetitive prices or curtail production. A hearing was held within two weeks. As was typical in temporary exception proceedings, little advance notice was given.[216] Nevertheless, eight of the other majors appeared. Union had not expected this participation and was not fully prepared to counter their arguments. As a result, the opponents' presentations, rather than Union's relatively brief one, dominated the hearing.

The opponents' main argument was that Union's cost disadvantage resulted not from DOE regulations—a prerequisite for relief under the OHA's "gross inequity" standard—but from Union's own business decision to remain in the spot market in mid-1979 rather than to seek a new contract. Union responded that the regulatory system and crude markets were inextricably linked; any generally adverse effect should entitle a company to relief. The opponents also argued that Union's high utilization rate precluded a gross inequity in relation to other refiners, that the increase in foreign crude costs were not unique to Union, and that to subsidize its spot market purchases might encourage exporting countries to divert more of their crude from the contract market to the spot market. Union responded that absent emergency relief it would lower its utilization rate to below the national average, that its acquisition costs were far above average, and that a three-month grant of relief would hardly distort national economic policy. Union further suggested (somewhat vaguely) that relief could be structured to preserve the company's incentive to buy crude at the lowest possible price.[217]

Two hours after the hearing recessed, OHA Director Goldstein, the presiding officer, orally rendered his decision denying temporary relief. Because the average refinery utilization rate nationwide was only eighty-five percent, Goldstein found, Union's inability to operate at full capacity did not constitute a "gross inequity." Moreover, several other firms had managed to absorb their higher than average crude costs without special relief.

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[216] Three refiners served their opposing comments upon Union on the morning of the hearing, and Union did not serve the supplemental materials that the OHA had requested until later that day.

[217] Transcript, *In re* Union Oil Co., No. DEE-5748 (Sept. 13, 1979).

Goldstein next turned to Union's argument that the consuming public would benefit if the OHA encouraged Union to acquire crude from the spot market. Union had submitted a handful of letters from Union jobbers, and received support from the National Cooperative Refinery Association. Goldstein found that Union had failed to demonstrate any clear, specific harm to its customers, or any "acute" demand for the refined products that relief would enable Union to produce. On the other hand, he took seriously the risks that relief to Union might signal a willingness by the government to subsidize purchases of high cost crude in the spot market on a large scale, perhaps diverting additional contract crude into the spot market. Goldstein called for further study of this problem.[218]

Goldstein's decision to deny temporary relief, however, was only the end of the beginning of the *Union* case. For Union, the initial process provided valuable lessons about the substantive weaknesses of its claims and the methods it had used to present them. With more time to prepare and with this experience behind it, the company would eventually construct an effective claim for exceptions relief.

(ii). *The choice of decision process.* A recurrent issue throughout the entire *Union* proceeding was whether a DOE rulemaking or the exceptions process was the most appropriate method for addressing the problems caused by the disparity between contract and spot market crude prices. Indeed, of the three cases studied here, *Union* represents the DOE's most thorough consideration of this issue, and the only instance in which the ERA and the OHA coordinated closely in resolving this fundamental issue. In *Union*, the preference for the exceptions process had a clear, articulated policy basis. By using the exceptions process as a safety valve to relieve pressure for a more comprehensive approach, the DOE could assist those refiners that suffered most from crude cost disparities while avoiding a new policy that could actually increase those disparities by encouraging use of the spot market.

The DOE began considering the choice-of-process issue as early as the September 13 hearing on Union's request for temporary relief. Although some opponents had contended that Union's complaints could only be resolved through rulemaking, Union reasoned—and the OHA agreed—that the crude cost disparity problem was one that could be addressed through either rulemaking or the exceptions process, especially as Union had carefully tailored its contentions to the contours of the OHA's "gross inequity" and "unfair distribution of burdens" standards. In his decision, Goldstein had stated that although rulemaking was "possible" and the exceptions proceeding "appropriate," both should not proceed at the same time. A conflict might arise over bureaucratic "turf" and an ongoing rulemaking proceeding could prejudice an exception proceeding. Goldstein therefore decided to inquire whether the ERA intended to institute a rulemaking directed at this problem "in an expeditious time frame."[219] If not, he would continue to consider Union's application "on an expedited basis" by inviting public comments on it.[220]

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[218] *Id.* at 83-89.

On October 17, a *Federal Register* notice announced that although the "ERA has indicated that it is still considering this matter," the OHA would proceed with Union's exception application in view of the "urgency of Union's request."[221] The OHA was clearly impatient and was attempting to force the ERA's hand.[222] The OHA's notice also requested comments from Union's customers and from all refiners under the entitlements program on Union's application and on the more general issues raised by the high price of spot market crude, and announced that a public hearing would be held on Union's application. This unusual effort to broaden the scope of factfinding in an exceptions proceeding succeeded in eliciting comments from nearly 700 parties, including refiners and a large proportion of Union's jobbers, dealers, and customers. Several days after the OHA's action, the ERA announced that it had decided not to initiate a rulemaking yet, and expressed the now-familiar fear that a subsidy would encourage increases in both spot and contract market prices.[223]

The OHA proceeded with a second hearing in the *Union* case on October 30. Despite the flood of comments received and despite evidence of large and widespread disparities between different refiners in post-entitlement crude costs,[224] the OHA focused narrowly upon Union's particular problems. At no time did the OHA directly address the question of how many firms were in Union's position due to spot market price movements. Thus, the exceptions process never addressed, much less resolved, the initial issues that a rulemaking proceeding would have addressed: precisely what the problem was, how widespread and severe it was in the industry as a whole, and how it might best be remedied.

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[219] *Id.* at 91.

[220] Transcript, *In re* Union Oil Co., No. DEE-5748 (Sept. 13, 1979).

[221] 44 Fed. Reg. 59,932 (Oct. 17, 1979).

[222] This attitude would become even more evident in the *Ashland* and *Ohio Independents* cases. *See infra* notes 233-67 and accompanying text.

[223] Memorandum from Douglas G. Robinson, ERA Deputy Administrator (Oct. 15, 1979).

[224] Indeed, these disparities were larger than those that existed in 1974 when the entitlements program itself was created. *See* Draft Regulatory Analysis, Modification of the Entitlements Program to Reduce Differences in Domestic Crude Costs, Docket No. ERA-R-80-36, October 24, 1980.

Although the ERA had indicated that it might initiate a rulemaking once the OHA had passed on the exception application, it never did so. When the OHA granted permanent relief to Union and extended the possibility of such relief to others disadvantaged by high spot market-related crude costs, it relieved the pressure on the ERA to change the regulations. The OHA also avoided the demand for the larger, more broadly conferred subsidy that the ERA thought desirable, while giving hope that the worst cases (like *Union*) would be remedied.

(iii). *The award of relief to Union.* Two months after the second hearing on Union's application, the OHA issued a proposed and interim order granting relief. The OHA's turnabout probably reflected several factors. First, Union's jobbers and customers had presented evidence that they were being harmed by the high crude costs facing Union.[225] Second, Goldstein had devised a more acceptable form of relief; instead of granting additional entitlements, the OHA would simply require certain large producers to supply Union with crude at contract-level prices. By stepping up production or rearranging their previous contracts, these companies could more readily obtain the crude without paying the higher spot market prices. Requiring them to sell to Union at below-spot market prices would encourage them to avoid the spot market, and could thus prove less inflationary than a direct subsidy to Union through the entitlements program.[226] The OHA's proposed decision, issued December 21, 1979, adopted this remedial approach after finding an "unfair and disproportionate burden" for Union and "serious financial difficulties" for its marketers.[227] The OHA pointed to Union's relatively high crude acquisition costs and, even after discounting for Union's higher-than-average utilization rate, attributed Union's predicament not only to its own business strategy but to the entitlements and buy-sell programs as well. The OHA concluded that the majors had failed to demonstrate that Union had deliberately rejected opportunities for contracts or that its competitors had borne equally heavy regulatory burdens. Moreover, the regulatory programs had adversely affected Union to a far greater degree than other similarly situated firms.

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[225] One survey estimated a decline in gasoline sales by Union's jobbers five times greater than the national average. *See* Transcript, *In re* Union Oil Co., Case No. DEE-5748, at 111 (Oct. 29, 1979).

[226] Goldstein first suggested this possibility in the opening minutes of the October 30 hearing. *In re* Union Oil Co., No. DEE-5748, at 34-35 (transcript of hearing, Oct. 29, 1979). When Union's counsel readily agreed that its application could be construed to request just such a remedy, Goldstein advised Union to file a further submission that would elaborate how the directed sales might work. *Id.* at 41. On November 16, Union did so. *See* Second Set of Supplementary Comments of Union Oil Co., *In re* Union Oil Co., No. DEE-5748 (Nov. 16, 1979).

[227] *In re* Union Oil Co., No. DEE-5748, at 42 (Proposed Decision and Order, Dec. 21, 1979).

The OHA's remedy directed certain large refiners to make sales of crude to Union.[228] This remedy closely resembled the temporary relief the OHA had fashioned for Ashland Oil Company only a month earlier.[229] To alleviate the hardship to Union's marketers, the OHA required Union to operate its refineries at no less than the industry's projected average utilization rate; thus, Union could no longer profit by lowering its utilization rate. Union was further required to lower its motor gasoline and heating oil prices one cent per gallon and maintain those lower prices for most of the period of relief. The OHA also prohibited Union from using special DOE "tilt" regulations; these would have allowed Union to allocate its crude cost increases disproportionately to its motor gasoline. Finally, an "interim" order provided for immediate implementation of relief.[230] The OHA did not issue a final decision in the case, however, for another *two years*.[231] When it did issue a decision, the OHA upheld the earlier order on every point.[232]

b. Ashland: *The exception precludes the rule.* On November 12, 1979, shortly after American diplomats were taken hostage in Teheran, President Carter issued a proclamation halting United States imports of any Iranian crude not already loaded on tankers. Contracts between Iran and nineteen American companies, including Ashland Oil Company, were instantaneously aborted. Ashland, one of the largest independent refiners with a capacity approaching 400,000 BPD, had sold off its production operations during the early days of controls.[233] Suddenly forced to replace Iranian crude in the spot market, Ashland and the other companies faced a disparity in acquisition costs similar to Union's, as spot market prices had now risen to above forty dollars per barrel. Ashland's lost contracts for Iranian oil at approximately twenty-three dollars per barrel had supplied about a quarter of the crude it refined and, according to Ashland, could only be replaced in the spot market. Because Ashland's prices for refined products were already among the industry's highest, Ashland claimed that it could not pass the still higher costs of crude from spot market purchases through to its customers. Like Union, Ashland predicted that it would be forced to reduce its refinery runs unless the OHA granted immediate relief.

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[228] Rather than selecting the nine firms with domestic refining capacity of 500,000 BPD or more to supply Union, as in *Ashland*, the OHA selected the 15 refiners with domestic capacity of 200,000 BPD or more. This would lessen the burdens placed upon those nine refiners already designated to supply Ashland. The OHA calculated the share to be supplied by each refiner through a complex weighting of five indices that measured refinery runs, refinery utilization, worldwide production, average cost of imported crude, and overall adjusted cost of crude acquisition. The total amount of crude to be supplied to Union was 75,046 BPD in December; 70,881 BPD in January; and 58,560 BPD in February. Following a hearing January 22, 1980, the OHA extended the relief into February, despite a reduced disparity between spot market and contract prices.

[229] *See infra* note 243 and accompanying text. Union was not to pay more than the supplying refiner's average costs of imported crude for November and December, plus an increment of $1.50 per barrel.

[230] *See In re* Union Oil Co., No. DEE-5748, at 15 (Proposed Decision and Order, Dec. 21, 1979).

[231] A principal reason for the delay was that some of Union's new suppliers had sought to conduct extensive discovery, even up to the date of the Final Decision and Order.

[232] *See In re* Union Oil Co., No. BEA-0641, [10 DOE] ENERGY MGMT. (CCH) ¶ 80,104. As we shall see, this was in striking contrast to the *Ashland* case in which several subsequent decisions reduced the relief the OHA had initially granted. This contrast may reflect the OHA's greater care and deliberateness in rendering the proposed decision in *Union* than in its initial decision in *Ashland*. *See infra* notes 241-42.

On November 20, representatives of Ashland and other companies met with DOE Secretary Duncan to discuss appropriate regulatory responses to the presidential proclamation.[234] Along with other firms, Ashland recommended that the ERA immediately reinstitute the broad pre-1977 buy-sell program, which redistributed supplies of crude among all refiners. Ashland argued for an emergency rulemaking extending the program's benefits to all refiners that had lost Iranian contracts. The ERA appeared to agree with Ashland's suggestion when, on November 23, it proposed three alternative plans for adapting the buy-sell program to the Iranian problem: liberalizing the current program to benefit large refiners like Ashland; establishing a special buy-sell program to aid the large independents; or replacing the current program with a comprehensive allocation program among refiners.[235]

The ERA did not, however, share Ashland's sense of urgency. The ERA did not eliminate the prior comment period, as Ashland had urged, but simply shortened it from the usual 60 days to 30 days. The ERA reasoned that the two months needed for the last Iranian shipment to reach the United States would prevent any hardship before January 1, 1980. Fearing that the rulemaking might be a dead end and that bureaucratic delays might impede full implementation of any rule promulgated on January 1, Ashland decided to apply simultaneously to the OHA for immediate relief.

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[233] *See* OIL & GAS J., March 12, 1979, at 27; Interview with Hazel Rollins, former ERA Administrator (July 21, 1982).

[234] A week earlier, on the day following the proclamation, Ashland had discussed this subject informally with the ERA. Transcript, *In re* Ashland Oil Co. Nos. BEE-0373, BEL-0373, BSG-0007, at 76 (Nov. 26, 1979).

[235] In 1977, the DOE had revised the program, limiting its benefits to small refiners without ready access to foreign or domestic crude. Under these revisions, neither Ashland nor 13 of the 18 other deprived refiners was eligible to receive additional supplies to replace their Iranian crude.

An Ashland representative telephoned Goldstein and arranged a "procedural conference" on November 19 to discuss the form that Ashland's application for relief should take.[236] At this conference, the procedures the OHA intended to use to deal with Ashland's exception application took shape. Ashland's application, not surprisingly, resembled the application that Union had already put before the OHA two months before, which would likely be approved soon.[237] Because Ashland was far from being in danger of going out of business, it followed Union's lead and invoked the "gross inequity" and "unfair distribution of burdens" criteria rather than "serious hardship." Ashland predicted harm from cutbacks in refinery production both to its distributors and to the regions of the country, chiefly Minnesota and the Kentucky area, where its activities were concentrated.[238]

As in *Union*, the major refiners opposed exceptions relief to Ashland on the ground that a rulemaking was the appropriate means to address the problem. Here, they argued, the rulemaking was already under way. Goldstein, however, did not defer to the ERA and the rulemaking process as he had when rejecting Union's application for temporary relief. Instead, when he announced the decision granting temporary relief at the conclusion of the November 27 hearing, Goldstein simply noted that the outcome of the ERA's rulemaking remained uncertain, and might prove inadequate to meet Ashland's urgent needs.[239] Here, as in *Union*, reliance upon the exceptions process amounted to a decision not to address the more general problem.

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[236] The only communication between the OHA and the ERA on the subject was a telephone call from an assistant to ERA Administrator David Bardin to OHA Director Goldstein informing the OHA of Ashland's intention to apply for relief.

[237] The OHA later described what transpired at the November 19 procedural conference:

> Ashland advised the OHA that it intended to file a request for relief and requested advice as to the nature of the filing. The Director of the OHA suggested that the exceptions process was the procedural framework that was most appropriate and suggested the supporting data he thought would be necessary to respond to likely questions arising from the Ashland application. In addition, the Director and Ashland discussed the proper parties to be served, and agreed on a date for a hearing.

Transcript, *In re* Ashland Oil Co., No. BEE-0373 at 260-64 (Nov. 27, 1979). In retrospect, Goldstein believed that representatives of opposing interests probably should have been invited to attend that conference. Telephone interview with Melvin Goldstein (December 30, 1982).

[238] At the same time, Ashland also applied for "special redress" relief because it had been excluded illegally from regulatory benefits from the buy-sell program and other DOE programs. This part of the application would be dismissed when the OHA granted exception relief to the company.

In preparing its case, Ashland had profited from Union's recent experience and from the informal procedural conference with Goldstein. Ashland presented fifteen witnesses, including company officials, several independent gasoline marketers supplied by Ashland, representatives from airlines, two railroads, and utilities that Ashland served, and state officials from Kentucky, West Virginia, Ohio, and Minnesota, all areas served by Ashland. Statements by Senator Wendell Ford of Kentucky and Congressman Nick Rahall of West Virginia rounded out Ashland's affirmative case. Reports also circulated that Ashland had used its Minnesota connections to enlist Vice President Mondale, a former Senator from that state, to express support for its application.

In view of Goldstein's determination to press the hearing to an early conclusion and decision, Ashland's extensive presentation preempted much give-and-take in the hearing itself, leaving little time for the opposing arguments of the eight majors that sent representatives.[240] Besides citing the ERA's pending rulemaking, the majors argued, as they had in *Union*, that Ashland's dependence on Iranian crude was caused by its discretionary business decisions, not by the regulatory program. They also argued that Ashland's present difficulty resulted from a presidential action not subject to the DOE exceptions process, and that immediate relief was unnecessary because Ashland's last supplies from Iran would not be exhausted until January 1.

Announcing his decision at the conclusion of the hearing on November 27, Goldstein rejected each of Ashland's opponents' contentions.[241] He found that Ashland had met the necessary criteria for temporary exception relief, and he granted relief to last three months.[242] As in *Union*, the OHA required Ashland to maintain both historical production levels and certain allocation fractions for gasoline and other refined products during the relief period. The OHA assigned nine refiners with refining capacity exceeding 500,000 BPD to supply Ashland, at prescribed volumes and prices.[243]

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[239] Transcript, *In re* Ashland Oil Co., No. BEE-0373, at 234 (Nov. 27, 1979). Goldstein's decision was not subject to Administrative Review Committee jurisdiction. Grants of temporary exceptions are within the discretion of the OHA itself. *See supra* text accompanying note 136. His disregard for rulemaking caused much dismay within the DOE. His prediction was vindicated, however, when the Department concluded that the Iranian situation did not justify a regulatory change and abandoned the rulemaking. *See* Interview with Douglas Robinson, former ERA Deputy Administrator (May 20, 1982). As Goldstein had anticipated, new DOE regulations would not be welcomed by a President entering an election year on a platform of deregulation. Moreover, the OHA's action doubtless strengthened the case for aborting the rulemaking, for the OHA had relieved the pressure for regulatory change from one of the most vocal and influential companies. Thirteen refiners, including Ashland, had lost Iranian crude and remained ineligible for buy-sell program relief. *See* Kerr-McGee Corp., [4 DOE] ENERGY MGMT. (CCH) ¶ 81, 252 (Dec. 21, 1979). Still, the buy-sell program amendment that Ashland initially sought from the ERA might have alleviated hardships suffered by the other twelve refiners, hardships that could have been significant while not being severe enough to justify exceptions relief. This might have saved Ashland, the DOE, and the other parties to the *Ashland* cases the years of litigation and uncertainty that were to follow.

[240] *See infra* notes 375-77 and accompanying text.

Marathon Oil and several other mandated suppliers immediately challenged the OHA's action in court. They contended that the OHA's procedures—the ex parte conference between Ashland and Goldstein; the inadequate notice before the hearing; the lack of prior notice of confidential materials discussed in a closed hearing session; Goldstein's curtailment of questioning and of testimony opposing relief; and lack of prior notice of the OHA's criteria for selecting Ashland's suppliers—violated due process. The district court, denying Marathon's request for a preliminary injunction, upheld the OHA's procedures, but only "in view of the patent emergency to which the OHA proceeding was addressed" and the "relatively limited duration [of the] order issued by that body."[244] Stressing that its decision "should not be regarded as an endorsement of possible OHA action on a longer-term basis with more lasting policy implications," the court warned that "when the exception becomes the rule, rulemaking is the appropriate method—with all of the procedural safeguards attendant thereto—by which the Department of Energy would generally have to proceed."[245]

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[241] Statement of Chairman Goldstein, Transcript, *In re* Ashland Oil Co., No. BEE-0373, (Nov. 27, 1979). First, several firms had conceded that Ashland's decision to contract with Iran was not imprudent when made in the summer of 1979. *Id.* at 250. Second, Goldstein stressed the "interrelationship of energy decisions made by the executive branch of government, and the impact on firms of those actions when filtered through the various DOE regulatory programs," citing OHA cases that granted exceptions relief in connection with executive branch efforts to strengthen the Puerto Rican economy. *Id.* at 237. Finally, Goldstein held that Ashland could not prudently continue at existing refining levels if it faced sharp curtailments after January 1. *Id.* at 248.

[242] *Id.* at 236-49.

[243] *Id.* at 253-57. One of these refiners, Gulf Oil Corporation, apparently received no notice of the hearing, much less of the order requiring it to supply Ashland with 9440 barrels of crude per day for three months, until after the hearing had been held and the order issued. *See* Exhibit I to letter dated July 5, 1983 to William C. Bush, Administrative Conference of the United States, from Edward T. Cotham, Jr., The Gulf Companies.

[244] Marathon Oil Co. v. DOE, 482 F. Supp. 651, 658 (D.D.C. 1979).

[245] *Id.* On July 14, 1980, the court granted summary judgment to the DOE, holding that the OHA's decision was rational and supported by substantial evidence, and that the ex parte communications between the OHA and Ashland did not prejudice the mandated suppliers. On appeal, the TECA ruled that because a final decision in the case was still pending, the temporary exception was not ripe for review. Eight of the nine mandated-suppliers settled with Ashland and the OHA. Marathon's challenge is still pending. *See* Ashland Oil Co., Gulf Oil Corp., [9 DOE] ENERGY MGMT. (CCH) ¶ 81,058 (July 19, 1982).

Although the court did not condemn the merits of the *Ashland* decision, the OHA cast doubt upon the wisdom of its earlier order by substantially reducing the level of relief on no less than three occasions over two and one half years, ultimately by more than 35 percent.[246] The long delay in issuing a final decision reflected intense controversy within the DOE about the excessive relief Ashland had received. The OHA found that Ashland should have been granted only half of the already twice-reduced allocation of 55,000 BPD that it received in February 1980. But ordering Ashland to return the excess crude to its suppliers in 1982, a time of glut in world crude markets, would hardly compensate them. The OHA therefore ordered restitution of almost six million dollars, the total of the profits that each supplier had lost from having to supply Ashland the excess relief. Appeals of this order to the FERC and the courts will continue for years.[247]

Ashland reveals certain flaws that seem inherent in an exceptions process that grants massive relief swiftly after summary, informal procedures in the face of a perceived emergency. Rapidly changing market conditions, probably unforeseeable at the time, undermined the OHA's basic assumptions. Ashland's claims, which of course emphasized the magnitude and persistence of its distress, could only be clearly confirmed or refuted well after the fact. Yet relief, once granted, could not readily be withdrawn. Those companies that the OHA had compelled to provide the relief could not easily be made whole when the error was finally discovered years later. In a complex industry with rapidly changing market conditions, the status quo ante is difficult to discern, much less to recreate. Huge investments may have been made on the basis of the earlier grant of relief. Relief-related price changes may have already been passed through to customers and ultimately to consumers, affecting their economic decisions in complicated ways. In these and many other ways, these remedial eggs are especially difficult to unscramble.

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[246] On January 23, 1980, the OHA ordered that the sales it had directed to Ashland be reduced by 25% (to 60,000 BPD). Ashland Oil, Inc., [5 DOE] ENERGY MGMT. ¶ 82,513 at 85,035 (Jan. 23, 1980). It now appeared that some of Ashland's problems would have occurred regardless of the President's action, and that the competitive situations of Ashland and its customers were not nearly as disparate as had been predicted. *Id.* at 85,034. The OHA ordered a second reduction in the volume of directed sales to Ashland on February 11, 1980, when the assumptions underlying the January order appeared to be wrong. Ashland Oil, Inc., [5 DOE] ENERGY MGMT. (CCH) ¶ 82,523, at 85,101-02 (Feb. 11, 1980). The third reduction did not occur until two and one half years later, when the OHA issued its final decision in the case. Ashland Oil Co., Gulf Oil Corp., [9 DOE] ENERGY MGMT. (CCH) ¶ 81,058 (July 19, 1982). During the relief period, the disparity between the spot market and Iranian contract prices, as well as Ashland's dependency on that market, had declined dramatically; indeed, in February 1980 Ashland supplied its customers with 4 percent more of their base period allocations than the OHA's order required. *Id.* at 82,839.

[247] Interview with Fred Drogula, Counsel to Ashland Oil (June 2, 1982); *see, e.g.,* Ashland Oil Co., [10 DOE] ENERGY MGMT. (CCH) ¶ 82,524 (Oct. 28, 1982)(partially granted applications for modification of exceptions decision).

Although the ERA dropped its rulemaking proceeding once the OHA had granted relief, it may be that the problems that *Ashland* posed for the exceptions process would have been better addressed by the ERA through rulemaking. Perhaps the problems were generic in nature, demanding a more comprehensive analysis and solution than an exception process focused upon individual cases (and atypical ones at that) can furnish. There are reasons, however, to doubt this. Of the firms that had contracts with Iran, only Ashland and one other company applied for exceptions relief, and only Ashland met the standards for relief. Moreover, relief had to be granted almost at once if it were to be effective, yet the ERA's ability to promulgate sound rules quickly was notoriously limited. Thus, the OHA's willingness and ability to act swiftly and decisively, later adjusting its remedy in light of new evidence and changing conditions, must be applauded. Even if the specific relief the OHA granted seemed excessive (at least in hindsight), its flexibility and responsiveness were essential.

3. *Pricing Alaskan North Slope crude oil—The* Ohio Independents: *the exception provokes the rule.* More so than in *Union* or *Ashland*, DOE regulations directly caused the difficulties for which Ohio Independents for Survival (OIS) sought exceptions relief. In 1977, the DOE decided to subsidize Alaska North Slope (ANS) crude through the entitlements program, as it had subsidized production of several other special categories of oil. The DOE had previously treated ANS crude, like other new domestic production, as "upper tier" controlled oil under the allocation and pricing regulations. Under the ERA's new rules, ANS crude's price status would continue, but the DOE would treat it as imported crude for entitlements program purposes. By earning entitlements rather than having to purchase them, refiners of ANS crude (who were also ANS producers) would enjoy a subsidy similar to that of small refiners under the small-refiners bias. According to the DOE, this subsidy was necessary to compensate for the high cost of transporting ANS crude from Alaska, because producers could not recover that cost under the pricing regulations.[248]

This change brought the after-entitlements price of ANS crude roughly in line with the price of imported and other uncontrolled oil. But when world spot market prices rose above forty dollars per barrel in 1979, inflating domestic uncontrolled prices as well, the new rule distorted these relationships. The price of "new" oil soared, yet the regulations limited price increases for ANS crude; by January 1980, the total after-entitlements cost to refiners of ANS crude, including transportation cost, was nearly ten dollars per barrel below that of domestic uncontrolled crude.[249]

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[248] 42 Fed. Reg. 41,565 (Aug. 17, 1977).

Three large refiner-producers—Sohio, Arco, and Chevron—controlled 94 percent of all ANS crude. DOE pricing regulations required these companies to reflect their lower crude costs in lower product prices. They were therefore obliged to price their refined products well below other firms' prices. Indeed, Sohio, which refines and markets most of its products in Ohio and was the most geographically concentrated of the three companies, was charging ten to twelve cents per gallon less at the gasoline pump than its competitors. As a result, Sohio's gasoline sales increased by about 25 percent between early 1979 and early 1980, despite Ohio's declining demand overall.[250] Sohio's lower prices severely undercut the independent marketers that comprised the OIS, whose 94 members sold most of the refined products independently marketed in Ohio.

In *Ohio Independents for Survival*,[251] OIS petitioned the OHA to order the ERA to develop a rule remedying Sohio's regulatory windfall. Subsequently, OIS urged that the OHA, which disavowed any authority to issue such an order, itself eliminate the entitlements benefits for the ANS crude through a special redress order. At the April 8 hearing, Goldstein opined that "the economic viability of Ohio independent distributors is in very serious jeopardy" because of Sohio's subsidy, but he declined on two grounds to order the relief OIS requested.[252] First, the OHA could not compel the ERA to initiate a rulemaking. Second, Sohio had not received adequate notice of the specific relief urged by OIS. Instead, Goldstein would forward the hearing transcript and relevant documents to the ERA, emphasizing the "very urgent situation."[253] Goldstein suggested three forms of possible relief, inviting OIS to apply for a temporary exception because it was the only avenue of relief that did not require that the rest of the Department concur.[254] A week later, OIS did so, urging that Sohio be required to pay into the entitlements fund an additional four dollars per barrel of ANS crude, and then to reflect this additional cost in higher product prices. OIS also requested the OHA to make regulatory adjustments further raising Sohio's prices, and to lower the amount of product that Sohio's dealers were distributing.[255]

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[249] ANS crude, then 9 percent of refinery purchases, cost $304 million less in January 1980 than the same volume of crude purchased at average cost. Economic Regulatory Administration, Draft Regulatory Analysis: Modification of Entitlement Treatment of Controlled Alaska North Slope Crude Oil, May 7, 1980, at 4.

[250] *In re* Ohio Independents for Survival, No. DOE/BEE-1075, at 151 (April 30, 1980)(transcript of proceedings) [hereinafter cited as *Ohio Independents* Transcript].

Forty-four members reported that average sales in March 1980 declined 30 percent below March 1979 levels. Reduced market shares and serious financial difficulties squeezed their profit margins substantially. *See* Statement of Chairman Goldstein, *Ohio Independents* Transcript, *supra* note 250, at 152-53.

[251] No. BEL-1075 (May 1, 1980), *rescinded,* No. BEX-0055 (May 5, 1980).

[252] *See* Statement of Chairman Goldstein, *In re* Ohio Independents for Survival, No. BSG-0018, at 157, 158-59 (transcript) (April 8, 1980).

An April 30 hearing added little new evidence to the record of the previous hearing. Sohio, unable to show that independent marketers had not been victimized by its subsidized pricing, emphasized that its lower prices benefitted Ohio consumers. Sohio also questioned the OHA's authority to grant relief extending beyond OIS members. Finally, it maintained that the ERA's impending rulemaking made exceptions relief inappropriate.

Like the issues presented in *Ashland* and *Union*, the problem posed by subsidizing ANS crude affected more than the individual exceptions applicant. Also, as in *Ashland* and *Union*, this exception proceeding concerned only the most pressing instance of the problem, reflecting the concentration of Sohio's marketing operations in the Ohio area. In the temporary exception hearing, an attorney for OIS quoted a statement by the ERA Administrator that a rulemaking notice to address the problem would appear within a week.[256] Doubting that the ERA would act,[257] Goldstein conducted the exception proceeding without any material contribution by the ERA.[258]

Goldstein's decision at the conclusion of the hearing brushed all objections aside. Abandoning any pretense of deference to the prospect of ERA rulemaking, he held that exceptions relief was appropriate whenever the OHA's standards were met and relief through a rulemaking was uncertain or might not occur quickly enough. Indeed, quoting from the proposed decision in *Ashland*, Goldstein argued that the OHA was actually compelled to grant relief unless a final rule was imminent, regardless of whether a rulemaking was pending or whether a rule would be preferable.[259]

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[253] *Id.* at 160.

[254] The first was the removal of ANS crude from Sohio's entitlements credits; the second, "that Sohio be required to buy entitlements of a certain dollar value"; the third, "that Sohio be required to sell products to certain Ohio Independents." *Id.* at 161-62.

[255] *Ohio Independents* Transcript, *supra* note 250, at 4.

[256] *See* Statement of William H. Bode, *Ohio Independents* Transcript, *supra* note 250, at 115. The lawyers for OIS quoted the ERA Administrator as saying she supported exception relief despite the pending rulemaking, *id.*, but even if she had called Goldstein to tell him this, as they claimed she had promised to do, no mechanism existed to resolve how the rulemaking and the grant of exception relief would interact.

[257] Telephone interview with Melvin Goldstein (December 30, 1982).

[258] Interview with Melvin Goldstein, former OHA Director (June 3, 1982).

Although the question of remedy had received little consideration at the hearing, the OHA's solution differed significantly from even the innovative remedy it had prompted OIS to request. Instead of basing Sohio's new entitlements purchase obligation in its total refinery production, as OIS had urged, Goldstein based it on the price differential on Sohio's refined products in Ohio multiplied by its gasoline sales in Ohio, a total of over fourteen million dollars. Sohio could recover this cost only by increasing its retail gasoline prices in Ohio. As if granting relief to OIS by requiring Sohio to buy entitlements were not unusual enough, Goldstein concluded that if Sohio's additional entitlement purchases went into the pool of entitlements funds and ultimately contributed to lower net crude costs and gasoline prices for all refiners, the refiners would use the savings to decrease their banked costs[260] rather than to lower their prices. To avoid this, the fourteen million dollar payment would be entered as a separate line item in the entitlements list, and the money placed in an escrow account in the United States Treasury. The OHA's order purported to give the ERA discretion to "take into account" the fourteen million dollars in "any rulemaking proceeding which it may conduct" with respect to the ANS crude, and authority to dispose of the funds in the course of such a rulemaking. If no ANS rulemaking occurred, the OHA could, "in its discretion," transfer the escrowed funds to unrestricted Treasury accounts or "conduct further proceedings" concerning the disposition of the funds.[261]

Goldstein's decision, although characteristically creative, left open some crucial legal and policy questions, such as what the ERA or the OHA should do with the fourteen million dollars and how to integrate the OHA's regulation of Sohio's marketing operations in Ohio into the rules that the ERA was presumably about to develop. The decision, which threatened to preempt ERA's authority, just as *Ashland* had, was extremely controversial, and many believed that its main purpose was to goad the ERA into developing a new policy on ANS crude.[262] On May 5, 1980, four days after the original decision, Goldstein rescinded it, "pursuant to a determination of the Deputy Secretary" of the DOE.[263]

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[259]
> In contrast to the rulemaking authority of the ERA, the adjudicatory authority of OHA is nondiscretionary. The DOE Organization Act requires OHA to entertain applications for exception and, if the applicant makes a showing that a DOE rule or requirement is causing it to incur a serious hardship, gross inequity or unfair distribution of burdens, appropriate exception relief must be granted.

Ohio Independents Transcript, *supra* note 250, at 147. This argument was perhaps disingenuous in light of his own encouragement to OIS to apply for exception relief and the reality of the OHA's broad discretion over whether, in what form, and in what amount relief should be given. In fact, Goldstein believed that any ERA rulemaking would have been too protracted to be useful. Telephone interview with Melvin Goldstein (December 30, 1982).

[260] Refiner pricing regulations allowed these companies to "bank" or carry forward increased costs incurred in a given month of measurement and not recovered during that month. 10 C.F.R. § 212.83(e) (1981).

[261] Ohio Independents for Survival, [5 DOE] ENERGY MGMT. (CCH) ¶ 81,306, at 83,327 (Case No. BEL-1075)(April 30, 1980), *decision and order rescinded,* [5 DOE] ENERGY MGMT. (CCH) ¶ 82,555 (Case No. BEX-0055)(May 5, 1980).

Two days later, the ERA issued its "regulatory analysis," a detailed consideration of the alternative regulatory remedies for the problem of ANS crude,[264] and the next day published a proposed rule. In contrast to the exception proceeding, participation in this rulemaking process was extremely broad, with testimony and written comments from representatives of all segments of the petroleum industry, including producers, refiners, marketers, and farmers' energy cooperatives, as well as the United States Department of Justice, the Federal Trade Commission, United States congressmen and senators, and officials representing Ohio, Alaska, New York, Massachusetts, California, and the City of Los Angeles.[265] Within two months, the ERA announced a final rule treating ANS crude as a separate category for entitlements program purposes,[266] eliminating almost all of the problem.[267]

The *Union*, *Ashland*, and *Ohio Independents* cases afford different perspectives on the strengths and limitations of the exceptions process administered by the OHA. In each case, the OHA moved decisively to fill a remedial void created by the ERA's institutional paralysis and to meet an apparently urgent and immediate need until more systematic changes could be shepherded through the intricate political and administrative systems that shape energy policy. In each case, the OHA's speed, independence, flexibility, broad equitable discretion, and managerial talent commended it to the DOE policymakers. At the time, "Letting Mel do it" struck harried energy officials as a prudent response to a set of harsh institutional, administrative, and political constraints. The DOE was able to ward off particular threats to large domestic refining operations without committing itself to a broad policy of future subsidies, one that might be a good deal easier to launch than to terminate. Yet as the OHA's successive orders modifying Ashland's relief demonstrate, this incremental approach entailed certain characteristic risks—in particular, those associated with basing far-reaching decisions on a narrow, firm-specific record compiled in an emergency hearing before a single, largely autonomous official.

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[262] Ohio's congressional delegation was astonished that the DOE would mandate a large increase in gasoline prices to Ohio consumers. The White House, fearful of the political effects of a well-publicized price increase on the impending Ohio presidential primary, expressed concern to the Deputy Secretary, John Sawhill, who directed Goldstein to withdraw the decision. Goldstein later conceded that he "might have overreached." Interview with Melvin Goldstein, *supra* note 258; telephone interview with Melvin Goldstein (December 30, 1982).

[263] Supplemental Order, Ohio Independents for Survival, [5 DOE] ENERGY MGMT. (CCH) ¶ 82,555 (Case No. BEX-0055) (May 5, 1980). The decision left no doubt in anyone's mind about what had transpired.

[264] *See* Robinson, *supra* note 223. Sawhill may have directed the ERA to complete its analysis and proposed rule on an accelerated basis. Telephone interview with Melvin Goldstein (December 30, 1982).

[265] *See* Final Rule, Alaska North Slope Crude Oil Entitlements, 45 Fed. Reg. 46,752, 46,753 (July 10, 1980)(codified at 10 C.F.R. §§ 211.62, 211.66(h), 211.67, 212.131 (1981)).

[266] 45 Fed. Reg. 46,756-59. It was subject to "a uniform entitlement obligation which is in effect the difference between all refiners' reported weighted average acquisition cost for all crudes and all refiners' reported weighted average cost for ANS upper tier crude oil." *Id.* at 46,752.

[267] Interview with William Bode, attorney for OIS (June 23, 1982).

In *Ohio Independents*, these risks assumed large proportions indeed. Viewed most charitably (but, of course, in retrospect), Goldstein's actions seem impetuous. He urged OIS to apply for a temporary exception in the face of planned rulemaking activity; he suggested specific remedies to the applicant; he conducted a hearing at which problem and remedy were only superficially explored; he rendered an immediate decision; he fashioned an exotic remedy reflecting little if any coordination with the ERA and perhaps impeding the ERA's more comprehensive solution. Goldstein did all this under the dubious theory that he was legally compelled to grant relief, yet he chose to ignore the OHA's institutional limitations and the primary responsibility of the ERA, the larger policymaking apparatus of the DOE. Although *Ohio Independents* may have been sui generis and not inevitable, it nevertheless illustrates the ease with which an exceptions process can be abused and extended beyond its proper limits. This risk exists whenever an administrator views the flexibility and speed of the exceptions process as adequate justifications for its use, and then proceeds without adequate regard for the significant weaknesses and constraints under which that process operates.

4. *The Motor Gasoline Crisis of 1979.* The decline and eventual cessation of Iranian crude oil shipments in late 1978 confronted DOE with its first major crisis since the Arab oil embargo of 1973. By changing its price and allocation regulations too late, too often, and with too little warning, the DOE exacerbated the shortage and contributed to President Carter's decision to phase out controls without waiting for the EPAA to expire. The failure of the DOE's policy apparatus swamped the OHA with a volume of exceptions applications far ex-

ceeding its capacity. This section focuses on the crucial base period provisions of the gasoline allocation regulations. Like the other case studies, it reveals characteristic strengths and limitations of the exceptions process.

a. *Background: The motor gasoline allocation regulations.* When the shortage struck in early 1979, the motor gasoline allocation regulations were essentially the same as those that the FEO had adopted five years earlier. In order to assure that the distribution of supplies during a shortage would mirror historic consumption patterns, the prescribed base period for each month was the corresponding month of 1972. In general, a supplier's allocation fraction[268] determined how much product each retail station or wholesale purchaser would receive from that supplier. If the product available for distribution was less than the amount the supplier distributed in the same month during 1972 (that is, if its allocation fraction remained below 1.0), each retail or wholesale purchaser subject to the allocation fraction methodology would receive the same proportion of the supplier's product that the purchaser had received during the same month of 1972.[269]

Although these regulations remained intact after the shortage ended in the spring of 1974, the availability of "surplus product" (supplies above the amount distributed in 1972) rendered them irrelevant. Because most gasoline stations or purchasers could find surplus product whenever they needed it, distribution channels gradually shifted away from the patterns dictated by the 1972 base period. New stations opened, others closed; some expanded, others contracted; many rearranged their relationships with suppliers; and the industry shifted from an emphasis on full-service retail outlets toward self-service and "gasoline only" stations.[270]

The original regulations had contained several "changed circumstances" adjustments, allowing for upward certification of base period volumes to reflect "unusual growth" or other changes in retail volume since the base period.[271] In August 1974, however, the FEA concluded that its regional offices had granted adjustments so liberally that they had significantly inflated suppliers' obligations and decreased the surplus product available for flexible distribution.[272] The FEA also believed that large refiners had exploited the adjustment provisions by gaining a share of the adjustments for their fully-owned, branded stations disproportionate to those obtained by independent, non-branded dealers and jobbers.[273] The FEA therefore eliminated the general adjustments, based merely on "changed circumstances" (i.e., "the potential for increased sales and consumption"),[274] and relegated such "speculative"[275] claims to the relatively stringent exceptions process.[276] Thus, the exceptions process became the only route by which many of the retail stations supplied by the large refiners—or, indeed, many of the refiners themselves—could apply for base period adjustments. Jobbers, however, could still certify base period volumes upward simply by showing increased sales by the independent dealers they supplied.[277] As a result, the regulated allocation patterns came to bear less and less resemblance to the actual market and to be disproportionately favorable to jobbers and unbranded independent dealers.[278]

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[268] An "allocation fraction" is the ratio between the amount of product available for distribution in a given month and the supplier's supply obligation for all levels of distribution for that same period, as measured by volumes experienced during the compounding month of the base period. 10 C.F.R. § 211.10(b) (1975).

[269] 10 C.F.R. § 211.10(f) (1975).

[270] GENERAL ACCOUNTING OFFICE, REP. NO. EMD-80-34, GASOLINE ALLOCATION: A CHAOTIC PROGRAM IN NEED OF OVERHAUL 23-24 (Apr. 23, 1980) [hereinafter cited as GAO Report].

[271] 10 C.F.R. § 211.13 (1974).

Many energy officials continued to believe after 1974 that outright repeal of all price and allocation controls was both imminent and preferable to making new adjustments; anachronistic rules strengthened their case for decontrol.[279] In June 1978, just before signs of an impending shortage began to appear, the ERA proposed broad *standby* authority for the ERA to designate a new base period—the 12-month period ending with the third month (or some other month designated by the ERA) before the month in which there was congressional activation of rationing.[280] The standby provisions became final on January 12, 1979, just as the shortage struck. The notice explaining the new standby rules failed to recognize either the need to adjust for growth after adoption of an updated base period or the danger of market disruptions from abrupt changes in the base period, although ample evidence of both existed.[281] This failure contributed significantly to the regulatory fiasco that followed.

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[272] Adjustments to Base Period Use, Shifting of Entitlements among Gasoline Outlets, and Distribution of Surplus Product, 39 Fed. Reg. 29,601, 29,602 (1974)(Notice of Proposed Rulemaking filed Aug. 14, 1974).

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] 39 Fed. Reg. 36,854, 36,854-55 (1974)(codified at 10 C.F.R. §§ 205.52, 211.10, 211.13, 211.106 (1974)).

[277] 39 Fed. Reg. 39,854-55.

[278] GAO Report, *supra* note 270. As early as 1976, President Ford's Task Force on Regulatory Reform took notice of this problem, and a proceeding to update the base period was actually initiated in 1977. 42 Fed. Reg. 20,826 (proposed Apr. 22, 1977), 42 Fed. Reg. 36,836 (withdrawn July 18, 1977).

[279] 42 Fed. Reg. 20,826 (proposed Apr. 22, 1977); 42 Fed. Reg. 36,836 (withdrawn July 18, 1977).

[280] Proposed Contingency Gasoline Rationing Plan, 43 Fed. Reg. 28,134, 28,136 (1978)(adding 10 C.F.R. § 500) (proposed June 22, 1978).

b. *An overview of the crisis.* As early as September 1978, Energy Secretary James Schlesinger warned that the United States faced a danger of gasoline shortages the following fall and winter.[282] Relatively stable international crude prices and domestic crude prices that regulation had kept relatively low induced unprecedented gasoline consumption that summer, reducing inventories to their lowest level since 1973-1974; by the end of 1978, product stocks remained seven percent below the level for 1977.[283] Meanwhile, the Iranian Revolution had gathered momentum; strikes that had begun at the Abadan refinery in October 1978 became increasingly widespread and foreign oil technicians soon left the country.[284] After a steady decline in Iranian production, Iran terminated oil exports on December 26, 1978; they did not resume until the following March.

For the first four months of 1979, the United States confronted a net average shortfall of 630-700 million BPD, almost four percent of its total supply. Although this shortage was small compared to the eight percent supply shortfall of 1973-1974, gasoline consumers in some areas faced worse conditions. Long waiting lines first appeared in California in April, and acute shortages spread to eastern urban areas in May and June. Other areas, however, remained largely unaffected.[285] Government officials offered complicated and even contradictory explanations.[286] By mid-summer, gasoline lines had mostly disappeared. Iranian crude exports, 2.2 billion BPD in March when they first resumed, rose to three or four billion BPD in June, approaching the five billion BPD level which was typical during the Shah's reign. Two kinds of state and local regulations—maximum purchase requirements and "odd-even" rules—also helped curtail demand.

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[281] *See* Standby Product Allocation and Price Regulations and Improved Allocation Fractions, 44 Fed. Reg. 3928, 3930 (1979)(codified at 10 C.F.R. §§ 210, 211, 212 (effective January 12, 1979)).

[282] W. LANE, *supra* note 97, at 59; *see also* GENERAL ACCOUNTING OFFICE, REP. NO. EMD-79-97, IRANIAN OIL CUTOFF: REDUCED PETROLEUM SUPPLIES AND INADEQUATE U.S. GOVERNMENT RESPONSE (Sept. 13, 1979).

[283] W. LANE, *supra* note 97, at 60-61.

[284] *Id.* at 61.

[285] Interview with William Funk, DOE Office of General Counsel (June 30, 1982).

[286] One Federal Tráde Commission official suggested that the major oil companies might have contrived the shortage, but preliminary results of a study done by the Energy and Justice Departments at the behest of President Carter dismissed this charge as early as July 24. *See* ENERGY POLICY IN PERSPECTIVE: TODAY'S PROBLEMS, YESTERDAY'S SOLUTIONS 617-18 (C. Goodwin ed. 1981)(citing U.S. DEPT. OF ENERGY, REPORT TO THE PRESIDENT ON THE ACTIVITIES OF OIL COMPANIES AFFECTING GASOLINE SUPPLIES (July 24, 1979)).

When changes in the allocation regulations did emerge during the spring and summer of 1979, they came from a coterie of high-level DOE policymakers, with whom Goldstein's argumentative talents and experience earned the OHA great policy influence. Even more instrumental in changing the gasoline allocation rules, however, was the performance of the exceptions process itself. Although the persistent conflicts between the ERA and the OHA often impeded effective coordination of the rulemaking and exceptions functions, the gasoline crisis compelled the ERA to rely largely on the exceptions process to identify pressure points in the regulations. When the OHA experienced a surge in the volume of exceptions applications directed at a particular problem in the underlying regulations, the ERA could address it. If the ERA failed to respond adequately, the OHA could take matters into its own hands, as we shall see below.

c. *OHA in the early stages of the crisis.* By the time the standby regulations were in place in mid-January 1979, the shortage had arrived. Several major oil companies had begun rationing gasoline to stations. Several had applied to the OHA for exceptions relief to allow them to allocate to dealers on the basis of either the 1972 base period or the corresponding period in 1977, whichever was greater. The OHA recognized the inequity in having allowed jobbers to "upward certify" their base period allocations under the regulations, while keeping allocations to dealers directly supplied by the companies at 1972 levels. The OHA generally granted the alternative base periods requested, thereby assuring equal treatment for branded dealers.[287]

In this context, the exceptions process was performing its conventional "safety valve" function, relieving pressure on over-broad rules in individual cases.[288] Yet these cases also revealed that many refiners would soon begin rationing their supplies under the standby regulations. As the effects of the shortage began to appear, several refiners also petitioned the ERA to implement those regulations by updating the base period. In an Activation Order issued without prior notice or hearing, the ERA finally shifted the base period from 1972 to July 1977-June 1978; "information already provided by major refiners to OHA" had helped demonstrate the need for an updated base period. By implementing the change without prior notice and comment, the

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[287] *See, e.g.,* Shell Oil Co., [2 DOE] ENERGY MGMT. (CCH) ¶ 82,043 (Nov. 22, 1978).

[288] *See infra* notes 410-30 and accompanying text.

ERA probably exacerbated the gasoline shortage by binding the agency and the industry to many problems created by the new base period.[289]

Only two weeks after the Activation Order became effective, the ERA issued "Guidelines" attempting to clarify two aspects of the new regulations.[290] First, the guidelines articulated the basis for assigning suppliers and product volumes to new stations and other dealers without base period purchases. Second, they defined the "temporary exigent circumstances" accompanying an unusually low base period volume under which the ERA would raise an applicant's allocation. The ERA's publication of the guidelines reflected the OHA's exceptions experience; cooperation between the agencies was common during the crisis. The OHA would divide its exceptions caseload into discernible classes and present them to the ERA, which could address the problems that the cases pinpointed. In this instance, the OHA anticipated the impending deluge of applications for adjustments and the potential overlap between the exceptions process and the ERA's own adjustment procedures. Guidelines to the ERA's adjustments policy would help allay confusion by dealers and suppliers, relieving the OHA of some regulatory burdens.

Still, the exceptions backlog at the OHA, after climbing from 926 in January to 961 in February, jumped to 2612 in March and to *nearly 10,000* at its apex in September.[291] Any comprehensive regulatory framework applying to more than 150,000 service stations was bound to create numerous unanticipated anomalies. Although the ERA recognized that the exceptions process would be necessary "to provide relief to any firms experiencing hardship or gross inequity" due to the new rules, it had predicted that such cases would be "limited in number."[292] Poorly conceived and sloppily drafted rules surely contributed to the deluge; indeed, the ERA implicitly acknowledged the inadequacy of its allocation and price regulations by constantly amending them throughout the spring.[293]

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[289] 44 Fed. Reg. 11,202 (Feb. 28, 1979). For example, the change required all suppliers to recalculate their supply obligations immediately, often an impractical task. Enormous volumes of supplies had to be rerouted in a matter of days. Disputes over supply obligations commonly added to these logistical problems, entangling many supply networks in improper allocations, delayed shipments, confusion in routing supplies, and shortages at the retail level. Uncertainty about where supplies should be rerouted and how to apply for individual regulatory adjustments caused massive dislocations. Suppliers tended to hold back on deliveries until they could determine their new regulatory obligations. *See* SENATE COMM. ON GOVERNMENTAL AFFAIRS, 97TH CONG., 1ST SESS., DEPARTMENT OF ENERGY GASOLINE ALLOCATION PROGRAM 14 (Comm. Print 1981) [hereinafter cited as GASOLINE ALLOCATION].

[290] 44 Fed. Reg. 16,480 (Mar. 19, 1979).

[291] *Department of Energy Gasoline Allocation Program: Hearings Before the Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs*, 96th Cong., 2d Sess. 166 (1980)(statement of Melvin Goldstein) [hereinafter cited as *Gasoline Hearings*].

[292] GASOLINE ALLOCATION, *supra* note 289, at 15.

Nowhere were the deficiencies in the regulations seen more clearly than at the OHA, where officials quickly realized that the flood of applications would soon exceed the OHA's case processing capacity and detract from the care given individual cases. The OHA could readily categorize most of the early applications. Because increasing a jobber's allocation without imposing an additional supply obligation upon it could confer a competitive advantage greater than that needed to relieve serious hardship or gross inequity, exceptions standards for jobbers had to be more complex than those for retailers. Applications by retailers, the vast bulk of the cases, consisted of four categories. In proposed decisions and orders issued between March 15 and 23, the OHA set out its decision criteria for each category. Flexible judicial-type standards rather than hard-and-fast rules, these criteria would nevertheless help to streamline decisionmaking as the exceptions caseload mounted.

The first category of cases comprised requests by retailers whose business had expanded since June 1978, the last month of the base period. To qualify for relief under what became known as the *Duncan*[294] standard, a retailer had to show that: (1) it had sold a "substantially greater" average monthly volume after June 1978 than during the base period; (2) the increase "does not merely reflect a general increased demand for motor gasoline but instead is attributable to a significant alteration in the ongoing business practices of the firm"; and (3) denial of exception relief "will adversely affect the firm to a significant degree and might well jeopardize its continued existence as a viable business entity."[295] In the typical case justifying relief, a new owner had purchased the station toward the end of the base period and his aggressive marketing had raised sales volume.

In a second type of case, beginning with *Leo Anger, Inc.*,[296] the OHA granted relief based upon another kind of growth after the base period. Here, the three criteria justifying an exception were: (1) a "substantial capital investment" made to "realize an economic benefit" through increased sales of motor gasoline by the firm; (2) failure to realize the increased volume and consequent economic benefits until after the new base period; and (3) failure to realize the intended benefits, and a "significant" adverse effect in the absence of an exception.[297]

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[293] The GAO counted no fewer than *27 changes* in the gasoline and distillate regulations between January and July. GAO Report, *supra* note 270, at 15.

[294] Duncan Oil Co., No. DEE-2259 (proposed decision issued March 15, 1979).

[295] *Applications for Exception, Relating to Motor Gasoline Allocation Regulations*, 44 Fed. Reg. 40,391, 40,392 (1979)(issued July 3, 1979) [hereinafter cited as *Applications for Exception*].

[296] [4 DOE] ENERGY MGMT (CCH) ¶ 81,037 (June 18, 1979).

A third standard, announced in *Harrison Gas and Oil*,[298] required that (1) "unusual or anomalous events occurred during a base period" which (2) made the base period inappropriate as a measure of "relatively normal and customary period of business activity," and (3) "the consequent distortion . . . has adversely affected the firm in a significant manner."[299] These criteria substantially overlapped with those for the "temporary exigent circumstances" adjustment administered by the ERA.[300]

Finally, the OHA gave relief where the energy shortage unfairly burdened residents of a community in which a retailer was located. In *James Tidwell Chevron*,[301] for example, the OHA granted a higher allocation to one of two stations in a small community in which increased demand had resulted partly from closings of two other stations. The criteria the OHA used here were: (1) higher motor gasoline demand "as a result of a significant change in the circumstances under which the product is supplied or used"; (2) inability of the firm to purchase surplus gasoline; and (3) frustration of one or more of the policy objectives of the EPAA as a result of the inability of the firm to obtain additional product.[302]

d. *The "unusual growth" adjustment*. The *Duncan*, *Anger*, *Harrison*, and *Tidwell* standards were not adopted as formal rules. The OHA officials had quickly recognized that many requests for relief under these standards reflected the failure of the ERA's rules under the Activation Order to adjust for an entire category of stations—those that increased their average sales during the nine months following the end of the base period and that needed additional allocations to serve new customers. Considering that such an adjustment had clearly served a useful purpose in the 1974 regulations, this omission in the new ones was obviously mistaken. The ERA may have tolerated or even encouraged such defects in the regulations in the belief that any serious problems would be handled by the exceptions process. Implementation of rules without a prior hearing and comment period probably contributed to the errors, as did incompetent lower-level ERA staff work and hasty drafting encouraged by the crisis atmosphere. Nevertheless, high level officials in both the ERA and the OGC worked on drafts of the regulations, which circulated to the OHA and other DOE units for comments before being issued. They too must share the responsibility. The rulemakers' failure to anticipate that the absence of an adjustment rule during a severe shortage would cripple the exceptions process surely constituted a serious regulatory error, one among many during the gasoline crisis.

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[297] *Id.* at 82,653. In *Anger*, the new investment that qualified the retailer was over $500,000, *id.*, but other cases found sums as low as $47,000 to be substantial. *See Applications for Exception*, *supra* note 254, at 40,393-94 (referring to Howard Moore, No. DEE-2604 (March 30, 1979)).

[298] [4 DOE] ENERGY MGMT. (CCH) ¶ 81,033 (June 20, 1979).

[299] *Id.* at 82,638.

[300] *See infra* notes 320-21 and accompanying text. Illness of the owner or highway construction in front of the station were events that typically justified *Harrison* relief; applicants that had experienced growth since the new base period, including stations initially established during the base period, often qualified as well. 44 Fed. Reg. at 40,395.

[301] James Tidwell Chevron, [5 DOE] ENERGY MGMT. (CCH) ¶ 81,262 (June 8, 1979).

[302] 44 Fed. Reg. 40,391, 40,396 (1979).

The OHA's most significant change in the allocation base period rules that spring, the "unusual growth" adjustment, sought to correct this failure. As the backlog of exceptions cases continued to rise, almost doubling in April 1979, a majority of the pending exceptions cases involved retail outlets that had experienced "substantial growth" after the end of the base period. OHA officials continued to emphasize to the ERA and to the Deputy Secretary the need to relieve the pressure on the exceptions process by changing the rules. The OHA safety valve had not been designed to bear the full force of the regulatory program; a second safety valve had to be devised. The OHA proposed a new rule that would simply prescribe, across-the-board, what percentage growth would qualify a station for an increased allocation. This rule would be much easier to administer than the more general exceptions standards, and would eliminate much of the OHA's massive backlog. Eventually, the OHA and the ERA worked out the general outlines of the necessary rule,[303] but such details as whether the adjustment would be mandatory and where new supplies under the adjustment would come from remained unresolved. The ERA therefore was not able to promulgate the new rule in time to cover suppliers' obligations for April, and the OHA had to deal with hundreds of additional exceptions requests that the rule could have obviated.

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[303] Telephone interview with Joel Yudson, ERA staff official (June 28, 1982). The new provisions for allocations in April applied to retailers and wholesale consumers that purchased an average monthly volume of gasoline during the period from October 1978 through February 1979 that was 35% greater than their average monthly volume for the normal base period month of April 1978. These retailers and consumers would receive allocations determined by their average monthly volume from October 1978 through 1979 rather than April 1978. For May, retail outlets and wholesale consumers could use average monthly volume for October 1978 through February 1979 as their base period volume if it was 10% above their normal base period volume of May 1978.

The OHA/ERA solution to this dilemma entailed an innovative use of the OHA's exceptions authority to issue what amounted to a full-fledged rule. On April 18, the ERA issued a "Notice of Intent to Issue a Final Rule."[304] The notice of intent, which ERA had seldom used before, invited public comments upon an "Interim Final Rule" incorporating the "unusual growth adjustment" into the regulations.[305] But the notice also enabled the OHA to issue an extraordinary industry-wide "class exception" the very next day, immediately implementing the "unusual growth" adjustment for April under the identical formula that the ERA had just announced it intended to apply.[306]

The OHA had issued class exceptions before but probably none so closely resembled a legislative-type rule as the one issued on April 19, 1979. Following the Activation Order, for example, Amoco and other majors had applied for exception relief on behalf of their numerous branded retail outlets, and the OHA had generally granted class relief under the *Duncan*, *Anger*, or *Harrison* standards.[307] But this form of class relief bore little resemblance to the class exception issued April 19. First, the OHA initiated the latter proceeding *itself*.[308] Second, the OHA did so not only on behalf of those firms that had filed for exception relief,[309] but also for all parties that met the criteria for class membership. Retailers and wholesalers did not even have to apply to the

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[304] Notice of Intent to Issue a Final Rule, 44 Fed. Reg. 23,537 (Apr. 20, 1979).

[305] After the rule was issued, the ERA would solicit comments and hold a hearing. Interim Final Rule, 44 Fed. Reg. 26,712 (May 4, 1979).

[306] Class Exception Relating to Motor Gasoline Allocation Regulations, 44 Fed. Reg. 24,024 (Apr. 23, 1979).

[307] The criteria that the OHA had used as prerequisites for class exception in *Amoco*, and as far back as 1976, tracked the criteria in Rule 23 of the Federal Rules of Civil Procedure. According to these criteria, a class action could be maintained

> only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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[308] In explaining the class exception, the OHA did not evaluate its own ability to represent the interests of the class of retailers and wholesale consumers whom the absence of a growth adjustment had disadvantaged. Instead, the OHA simply ignored its own role in initiating the procedure, taking those that had already applied for exception relief, because of the conditions common to the class, as the representatives who presented claims typical of the class. *See* 44 Fed. Reg. 24,028-29 (1979).

[309] The OHA would take such action in at least one subsequent case during the crisis. *See* Class Exception and Proceedings Concerning Extension of Relief Previously Granted in Certain Motor Gasoline Allocation Cases, [4 DOE] ENERGY MGMT. (CCH) ¶ 81,049 (June 18, 1979); Second Class Exception Proceeding Involving Extension of Relief in Certain Motor Gasoline Allocation Cases, [4 DOE] ENERGY MGMT. (CCH) ¶ 81,174 (Oct. 22, 1979)(granting extensions of relief to 98 firms under the *Anger* and *Tidwell* standards). *But see* American Petroleum Refiners Ass'n, [3 DOE] ENERGY MGMT. (CCH) ¶ 81,094 (Apr. 9, 1979)(denying class relief on grounds that proposed class not so numerous as to preclude individual applications).

OHA for class certification. Unlike the provision in the Amoco class exception that had allowed Amoco to determine whether its retailers met specific criteria for relief, the OHA's order here benefited persons and firms without even an indirect connection to an exceptions application, and extended benefits not simply to one company's retailers but to qualifying firms throughout the industry.

In effect, then, the OHA's industry-wide order was indistinguishable from an ERA rule, in substance if not in form. To justify this, the OHA pointed to the practical inevitability of class relief, citing the ERA's notice of intent, previous exceptions cases such as *Duncan* and *Harrison*, and the low cost of administering this remedy. The OHA could avoid hundreds of exceptions cases, since suppliers and retailers no longer had to apply for relief in order to adjust relationships falling within the class.[310]

Public comments, however, highlighted a crucial and systematic flaw in the OHA's novel action. The OHA's fact-finding had been based only on the exceptions cases before it. Some serious difficulties with the proposed rule, identified by public commentators in the rulemaking proceeding, had been neglected by the OHA when it designed its class exception. First, the OHA's order simply decreed a base period volume for those in the class of the average monthly purchases during October 1978 through February 1979. This order failed to clarify one of the most controversial issues in the ERA rulemaking: whether the substitute base period was to be automatic and mandatory or would depend upon purchasers' applying to their suppliers for certification.[311] Second, the OHA brushed over an issue that some commentators had identified to the ERA: which supplier would be obligated to supply the increased volume to a retailer. Instead, its order simply provided that the new volume would be provided by the prime suppliers if they were base period suppliers, or, if not, then by any nonprimary supplier. Uncertainty over which nonprimary supplier would be required to supply the additional volume could have enabled *all* potential suppliers to deny any obligation to a purchaser that applied to them.[312] Third, the OHA also failed to address a broader defect of the unusual growth adjustment identified in comments to the ERA: the regional differentials created by the October 1978-February 1979 substitute base period provided by the new adjustment. The substitute base period, commentators argued, would disadvantage areas with low historical purchases during winter months and favor those with high winter purchases.[313]

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[310] 44 Fed. Reg. 24,028-29 (1979).

[311] In its May 1 Interim Final Rule, the ERA itself adopted a more complicated provision that generally made the adjustment mandatory, but made mandatory upward certification in certain cases contingent upon application by the retailer or wholesale consumer to its base period suppliers. Under the class exception, especially in instances where the identity of the proper supplier of additional product was unclear, *any* potential supplier could deny responsibility to grant the purchaser an upward certification unless the purchaser applied for it. *See* 44 Fed. Reg. 24,029 (1979); 44 Fed. Reg. 26,715, 26,717, 26,722 (1979).

These defects in the OHA's remedy cannot be dismissed as simply products of hectic emergency decisionmaking or of the energy industry's complexity. More fundamentally, they reflect the limitations of the exceptions process from which the OHA's rule emerged. The OHA's exceptions cases accumulated convincing evidence that an "unusual growth adjustment" of some kind was needed. But they shed little light upon how a comprehensive regulatory solution might be fashioned, especially in its crucial details. The OHA's narrow adjudicatory focus, well suited to its normal function of devising individual remedies, made it very difficult to design a policy that would make sense industry-wide. The OHA was equitably preoccupied with potential injury to individual firms caused by failure to grant relief, rather than with the broader impact of its orders. Overarching "legislative facts," such as effects on regional disparities, were naturally obscured in the individual cases upon which the class remedy was based.

The OHA's class exception, however, was not disastrous. Its threshold requirement of thirty-five percent growth from the base period allowed relief for April only in what the ERA would later call "extraordinary circumstances." It was never clear how many firms were affected. The total, perhaps in the hundreds, was certainly far below the thousands of stations affected by the ten percent growth adjustment for May that the ERA allowed in its Interim Final Rule. The class exception's narrower ambit limited the effects of inevitable remedial difficulties and the potential for regional distortions. Finally, the emergency that prevailed and the uncertainties of the ERA's rulemaking process may well have justified the OHA's innovative remedial intervention. Indeed, without this action or something like it, the exceptions backlog would have grown even more unmanageable than it did. As a result many more retailers, wholesale purchasers, and consumers would have suffered.

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[312] Again, the ERA's May 1 rule provided a specific process by which base period and other suppliers could calculate the volume each was obligated to supply to the retailer or wholesale purchaser-consumer.

[313] At the urging of White House officials and the Inter-agency Task Force, the ERA studied the issue, but reached inconclusive results.

e. *The floodgates open.* Besides initiating the unusual growth adjustment, the ERA's May 1 rule also changed the base period a second time, from July 1977-June 1978 to November 1977-October 1978.[314] These many rule changes doubtless swelled the backlog of exceptions at the OHA, which continued to rise from 5440 in May to 7096 in June, to an eventual peak of 9864 in September.[315] Even the OHA's "unusual growth" adjustment, clarification of the "temporary exigent circumstance" adjustment, and similar refinement of rules for new stations had failed to reverse this relentless tide. Indeed, the OHA found it necessary to continue to grant exceptions relief under the *Duncan*, *Anger*, and *Harrison* standards even after the ERA had implemented the unusual growth adjustment.[316]

The two adjustments built into the ERA's rules—concerning allocations for new stations and for temporary exigent circumstances—also failed to relieve the OHA's exceptions burden. Assigning volumes to new stations, while superficially straightforward, created new and severe problems. The owner of a new station would request an ERA regional office to determine the allocation to which it was entitled, based on the volume of the nearest "comparable" station. Each ERA regional office, however, tended to develop different criteria for applying that standard. Moreover, the ERA continued its liberal policy on assignments, encouraging the opening of as many stations as possible, even after the 1979 shortage struck.[317] Yet at the same time, the OHA denied most exceptions requests by existing stations for increased volumes.[318] Thus, an oil company could actually obtain an assignment for a new station more easily than it could obtain increased supplies for an existing one. This preference for new stations enabled aggresive marketing organizations to increase market shares in a new area at the expense of existing dealers. It was both anomalous and inequitable at a time when there existed a severe, agency-administered shortage.

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[314] 44 Fed. Reg. 26,716 (1979). The April 18 notice had announced the ERA's intention to change the base period to calendar year 1978 rather than to the base period actually adopted only two weeks later. The purpose, of course, was to adopt the most recent and, arguably, most representative base period possible, thereby minimizing the need for individual exceptions. By failing to act until three months after the activation order was issued, and by first proposing a 1978 base period that inexplicably ignored the market distortions that the Iranian cutbacks had already begun to create in 1978, the ERA again revealed its serious policy weaknesses. Because the November 1977-October 1978 base period prescribed the same allocations for May and June 1979 as did the July 1977-June 1978 base period, the ERA hoped that its new rule would require little rerouting of supplies. Yet these rule changes, along with at least 25 others during the crisis, *see supra* note 293, saved great confusion and uncertainty throughout the industry at a time when clear guidance was essential.

[315] *See DOE Gasoline Allocation Program: Hearings Before the Senate Permanent Subcommittee on Investigation*, 96th Cong., 2d Sess. 166 (1980).

[316] For example, the OHA still granted relief under *Duncan* to firms that began operations during the October 1978-February 1979 substitute base period; under *Anger* when the new base period failed adequately to represent the growth a firm had experienced as a result of investments that occurred late in the new base period or after it had ended; and under *Harrison* when the new base period "failed to reflect (the firm's) normal and customary business practices." *See, e.g.,* Frank Moody's Mobil Station, No. DEE-2635 (proposed decision issued April 5, 1979)(relief granted under *Duncan*); S&S Petroleum Sales, No. DEE-3335 (proposed decision issued May 22, 1979)(relief granted under *Anger*); R.C. Stroth, No. DEE-2301 (proposed decision issued May 25, 1979)(relief granted under *Harrison*).

[317] Interview with Doris Dewton, *supra* note 203.

The ERA's regional staff tended to be poorly trained and managed. As a result, both substantive consistency and procedural fairness in assignment proceedings often suffered. Although the OHA was loathe to use its power to review the ERA's assignment orders to dictate their substance, the OHA continually remanded appeals of assignment decisions to the ERA with instructions to clarify the grounds for decisions and to observe procedural requirements.[319] A growing number of incoming cases, processed slowly by the regional offices, created an ERA backlog comparable to the OHA's. Many retailers and other purchasers, uncertain about how and when the ERA and the OHA would decide their cases, applied to both; if the ERA did not process their assignment or other adjustment quickly, the OHA might perhaps grant relief in the interim. Despite regulatory provisions allowing exceptions only in the absence of a more appropriate proceeding, neither office acted systematically to discourage such duplicate applications.

An additional mechanism designed to relieve pressure on the exceptions process was the ERA's "temporary exigent circumstances" adjustment. This adjustment allowed purchasers and suppliers to work out increased allocations for months whenever unusual, isolated circumstances, such as highway construction around the station, had artificially lowered base period volume. The ERA did not itself administer this adjustment, but had to be notified when such an adjustment was made. Despite the ERA's efforts to clarify what might constitute "temporary exigent circumstances," purchasers and suppliers continued to disagree about when the adjustment applied.[320] Moreover, this adjustment overlapped with the *Harrison* standard for exception relief, encouraging purchasers to pursue both remedies simultaneously.[321]

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[318] Overall, the OHA granted exceptions in 1979-1980 in 27.5% of the retailer cases it processed. *See* Senate Hearing, *supra* note 315, at 184. No comparable records exist for ERA assignments.

[319] Interview with Richard Dugan, OHA Assistant Director (July 1, 1982).

[320] *See, e.g.,* Interview with Doris Dewton, *supra* note 203.

[321] Presumably to eliminate the most complicated "temporary exigent circumstances" cases, the ERA discontinued the adjustment for middle level marketers (jobbers) in its May 1 Interim Final Rule. *See* 44 Fed. Reg. 26,719 (1979). Thereafter, such purchasers would have to rely solely on exceptions relief, further burdening the OHA.

The OHA addressed its staggering workload problem in several ways. The *Duncan*, *Anger*, *Harrison* and *Tidwell* standards enabled the OHA to issue "form decisions," using standardized language and holdings, for perhaps 70 percent of its exceptions cases. Especially after May 1979, the OHA's regional offices were strengthened so that they could dispose of routine cases. Five of the ten regional offices became "regional centers" with nearly twenty employees. Before, they had been staffed by only one or two people and were barely equipped to process their mail. OHA officials from Washington personally established the facilities during the late spring and early summer, training employees to process cases better and faster.[322] By 1980, regional centers handled groups of cases from other regions whenever the OHA's headquarters saw opportunities to even out caseloads. Moreover, regional centers even handled some appeals from each other that otherwise would have gone to Washington for processing. Generally, however, the centers handled routine cases or form decisions. They referred more complicated cases to Washington. Regional processing of many exceptions cases also made it easier for small dealers, the vast bulk of exceptions applicants during the shortage, to seek relief. The normal individualized exceptions process was onerous for small businesses. They had either limited resources or simply too little at stake to prosecute exceptions cases. These cases often involved technical proceedings in which a lawyer might well be necessary. Regional centers reduced, but could not eliminate, the considerable expense of preparing for and attending a hearing.

Reform of regional offices occurred too late to assist the OHA in the crucial early months of the shortage. Other measures were therefore necessary to process the flood of exceptions cases. Through the "consolidated denial," the OHA lumped together a group of cases that failed to qualify under any of the standards, and denied all the applications in a single decision. Much of what this procedure gained in efficiency, however, it lost by reducing the thoroughness provided individual applicants once the OHA's analyst had classified them. The OHA attempted to address this problem by issuing its consolidated denials in proposed form. This permitted dissatisfied applicants to pursue their claims by filing objections to the proposed order.[323]

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[322] The total number of determinations from Regional Centers, including Proposed Decisions, Final Decisions, and other administrative case closings climbed from 75 in April to 358 in May, and reached 2467 in December before it subsided to an average of 1000 to 1500 cases a month during the first half of 1980. *See Gasoline Hearings*, *supra* note 291, at 167.

[323] According to the OHA, the objection rate was no higher for firms whose denials were contained in consolidated proposed decisions than for those that received individualized proposed denials. Letter to author from Kenneth A. Wasch, OHA Asst. Director, March 18, 1983.

The enormous caseload compelled OHA staff to sacrifice careful analysis and opinion writing for speed in processing cases. Traditionally these had been two of the OHA's strengths. The burgeoning exceptions caseload also impaired the quality of administrative review of OHA decisions. Deluged by thousands of routing decisions, the DOE's internal review committee agreed during this period to discontinue regular meetings and instead to review written decisions circulated by the OHA, a system that failed to provide an effective departmental counterweight or review mechanism for exceptions decisions.[324]

Delays were an inevitable consequence of the OHA's backlog.[325] Especially during the gasoline shortage, equity delayed was often equity denied. The failure of a local dealer to receive his allocation within a few weeks might well compel him to close the station. And even for dealers that managed to survive in the face of OHA delay, a grant of relief afterwards, when supply was plentiful again anyway, was tantamount to a denial. Well aware of this, the OHA regularly screened incoming cases to determine if consideration of temporary exception relief was appropriate. After May, hearings to grant such relief were usually held in the regional offices. The hearings, lasting two to four hours, typically included presentations by the applicant, its supplier, and sometimes its competitors. Temporary exception decisions usually evaluated only the evidence in the initial submissions and the hearing itself. Suppliers, conscious of legal expenses and anxious not to be caught in the cross-fire between numerous competing and desperate purchasers, tended to ignore these hearings or offer only very general comments. This passivity constituted yet another obstacle to accurate fact-finding.

f. *Conclusion.* The motor gasoline shortage of 1979 produced an administrative crisis for the exceptions process, a crisis that called into serious question the possibility of regulatory equity under conditions of severe shortage. As OHA officials candidly acknowledged, even the agency's best efforts could not succeed in sustaining the traditional high quality of its equitable process. Routinized, long-deferred, and hastily rendered decisions inevitably compromised the accuracy and responsiveness of the process and impaired public confidence in its fairness.[326]

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[324] Telephone interview with Joyce King, former ERA official (July 2, 1982).

[325] Officials estimate that the case disposition averaged 30 to 60 days, and that particular cases could take much longer. An applicant's inability to understand the legal standards or the factual information that the OHA required often aggravated these delays. Although the OHA generally tried to process applications in the order filed, its analysts had some incentive to decide the simplest cases first; this decreased the number of pending cases more quickly but left the more difficult and time-consuming cases, such as those brought by resellers, undecided for even longer periods.

The interesting and important questions, however, are why this breakdown occurred and why it was permitted to continue. In large measure, this problem—like so many at the DOE during the period of controls—can be traced to the deficiencies of the policy development and rulemaking processes. By attempting to administer comprehensive regulatory controls in an immensely complex, exceedingly dynamic market, the DOE ensured that numerous exceptions to its rules would be sought. By waiting until the crisis was upon it before undertaking to change its rules to account for shortage conditions, the DOE also ensured that it would make policy under the least favorable circumstances. By adopting new rules abruptly and without adequate public participation, and then constantly having to change those rules, the ERA maximized uncertainty and increased the pressure on the exceptions process. As policy initiative shifted by default from the ERA to the OHA, the exceptions process inescapably became a vehicle for regulating the industry. In a metaphorical sense, the safety valve became an autonomous generator of new pressures threatening the system; in a literal sense, the exception became the rule. A process designed for one purpose and eminently successful at achieving it had been obliged, without really altering its fundamental administrative character or resources, to discharge a very different function. What is to be wondered at is not that it failed but that it managed to succeed as well as it did.

III. An Analysis of the DOE's Exceptions Process

The predicaments of federal energy policy fundamentally shaped the DOE exceptions process. For example, the shortages of imported crude and the market distortions created by the tiered price of crude directly influenced the OHA's caseload and agenda. The regulatory structure, especially that of the entitlements program, conferred extraordinary power upon the DOE—nothing less than the ability to impose what amounted to a tax on crude oil, and to allocate the tax among refiners. Exceptions relief to any single refiner necessarily had industry-wide effects. When the OHA relieved one firm of an entitlement purchase obligation, the OHA thereby increased the costs of crude proportionately to all other firms in the industry, to their customers, and ultimately to the consumers of their products. The buy-sell program empowered the DOE to order any firm to sell to or buy from any other firm in the industry. This power vastly increased the OHA's remedial capability.

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[326] *See, e.g.*, *Gasoline Hearings*, *supra* note 291, at 92-142 (testimony of gasoline dealers); *see also* Interview with Richard Dugan, *supra* note 319.

To understand the role of exceptions in the regulatory process, however, one must look beyond the pressures of external crises and the structure of regulatory authority. One must also examine the particular, regularized patterns of administrative activity, informal relationships, and latent functions that characterized exceptions decisionmaking. This Part distills from the earlier case studies some important patterns and explores certain problems that they generated.

A. *Personalizing Bureaucratic Power.*

A defining and legitimating feature of bureaucracy is the impersonality of bureaucratic-legal authority. Whereas authority in other systems of power is legitimated by the religious or charismatic character of the individual wielding it, bureaucratic-legal authority derives its legitimacy from the respect accorded to rules, precedents, records, logic, and other more objective sources rooted in process rather than in personal attributes.[327] Nevertheless, many individual bureaucrats, such as J. Edgar Hoover, Hyman Rickover, and Robert Moses, have managed to place their personal imprints upon bureaucratic process to such a degree that their agency's character, public reputation, and perhaps even its legitimacy came to be identified with the individual who wielded the power.

On a far smaller scale, this was true of Melvin Goldstein. From the inception of the exceptions office in early 1974 until his departure from the agency in September 1980, Goldstein dominated the exceptions process so completely that to understand and evaluate that process one must know how he conceived of and executed it.[328] He and several OHA aides had administered price controls in general, and exceptions relief in particular, continuously since the early 1970's, well before the EPAA was enacted. Few other energy bureaucrats could boast such experience and continuity of leadership. Goldstein, a civil service employee who in 1978 became part of the Senior Executive Service, personally and painstakingly recruited a staff generally acknowledged to be among the most highly motivated, talented, and productive in the Department.[329] The OHA staff tended to dominate intradepartmental policy debates due to their generally superior analytical and legal skills, persuasive abilities, and efficiency at turning out written materials. Although sometimes criticized as arrogant, over-eager, and inexperienced, the staff was crucial to the OHA's pervasive influence upon energy policy.

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[327] 2 M. WEBER, ECONOMY AND SOCIETY 956-58 (E. Fischoff trans. 1978).

[328] Virtually all of the scores of individuals interviewed in preparation of this article appeared to agree with this proposition. Almost without exception and without prompting, they praised Goldstein's intelligence, managerial efficiency, policy sophistication, personal courage, and visionary leadership. Even those who vigorously disagreed with some of his tactics and decisions—and there were many—emphasized his personal integrity, intellectual independence, and bureaucratic skills.

Goldstein also possessed a clear and distinctive conception of the exceptions process and its role in energy policy.[330] Goldstein believed that rulemaking was an inherently limited tool for regulating the petroleum industry. First, general rules were almost invariably overbroad as applied to so large, complex and diverse an industry; urgent needs for relief were inevitable and had to be dealt with case-by-case. Second, the regulatory controls were fundamentally experimental; rulemakers could readily predict neither the problems requiring regulatory intervention nor the consequences of particular policy choices. Prudent regulators, therefore, would defer rulemaking as long as possible. Third, energy regulation required swift decisions that were flexible and responsive to rapidly changing market conditions yet grounded in a carefully compiled administrative record. The conventional rulemaking process, even one that invoked the more summary procedures available under the APA, simply could not be relied upon to generate such decisions. This shortcoming was not only endemic to the formal procedures mandated by law, but also reflected the chronic inadequacy of the program offices, notably the ERA.

For all of these reasons, Goldstein viewed the OHA as the "Lone Ranger" of the regulatory process, an institutional "white knight" of energy policy. The OHA could be counted on to make the hard decisions from which others recoiled, enabling the regulatory apparatus to function efficiently and fairly, to produce high quality decisions, and to overcome the ERA's failures. Perhaps more importantly, most other key energy policymakers acquiesced in these views and did not resist Goldstein's steady accumulation of policy influence. Indeed, as will be shown, other energy policymakers encouraged the OHA to discharge many crucial functions in the regulatory process.[331] Under these circumstances, an aggressive, activist exceptions process was probably inevitable. But Goldstein's *personalization* of bureaucratic power was neither inevitable nor, from the larger perspective of administrative law, desirable.

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[329] Many were hired in personnel categories (e.g., Schedule A for lawyers, Schedule B for analysts) not subject to the conventional civil service constraints.

[330] This reflected his earlier experience administering exceptions relief at the Cost of Living Council during Phase 4.

[331] *See infra* text accompanying note 425.

B. *Expansive Conception of the Exceptions Function.*

Many federal agencies either have no discrete exceptions process or have processes that are narrow in jurisdiction, reactive in nature, and marginal in policy significance—in short, exceptions processes designed to achieve regulatory equity proper.[332] The only question in hardship cases, where the policy and rule are more or less taken as already established and to be reaffirmed, is whether the individual applicant "fits" or not.

Goldstein conceived of the OHA's role very differently. To Goldstein, as well as to most of the key policymakers at the DOE, the exceptions process should play a far broader, more affirmative, essentially policy-shaping role. The OHA should not simply examine individual cases to see whether they fit within preexisting standards. Instead, it should sometimes decide initially just what those substantive standards *should* be and how they ought to be interpreted, applied, modified, and effectuated. To these policymakers, the DOE's exceptions process should not simply operate as an instrument of regulatory equity but should use adjudication as a tool for policy development and implementation.

This remarkably expansive conception of the exceptions process was in fact realized at the OHA, especially after the entitlements program was inaugurated in late 1974. Indeed, the range, novelty, and impact of OHA policy interventions are astonishing; the case studies in Part II discuss only a subset, although an important subset, of them. The OHA designed a complex system of subsidies and adjustments for small refiners;[333] adopted a comprehensive system for allocating refined petroleum products for the District of Columbia;[334] intervened to shore up the economy of Puerto Rico;[335] sought to stimulate the production of gasohol;[336] pressed for reimposition of regulatory controls over home heating oil;[337] established a new policy on the regulation of natural gas liquids;[338] rearranged long standing supply and marketing relationships among thousands of firms;[339] and subsidized new production processes, capital construction projects, and transportation arrangements.[340] In each of these decisions, and in many others, the OHA transcended the traditional boundaries of regulatory equity and "hardship" adjudication to create legislative-type regulation of the most far-reaching kind. In almost every case, it did so with the apparent knowledge and support of the departmental leadership.[341]

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[332] *See* P. Schuck, *supra* note 50, at app. G (the author's analysis of agency responses to an Administrative Conference questionnaire concerning their exceptions processes).

[333] *See supra* notes 140-205 and accompanying text (*Delta-Beacon* case study).

[334] The District of Columbia, No. DEZ-0058 (Interlocutory Order filed Jan. 4, 1980)(summarized at 45 Fed. Reg. 1452 (1980)).

[335] *See e.g.,* Commonwealth Oil Refining Co., [4 DOE] Energy Mgmt. (CCH) (1979) ¶ 81,118 (Aug. 15, 1979).

[336] *See e.g.,* Welsh Oil, Inc., [6 DOE] Energy Mgmt. (CCH) ¶ 81,038 (June 24, 1980); American Agrifuels Corp., [4 DOE] Energy Mgmt. (CCH) ¶ 81,139 (August 28, 1979), *aff'd sub nom.* Amoco Oil Co. v. DOE, 490 F. Supp. 1016 (D.D.C. 1980).

C. *Autonomy.*

Goldstein was convinced that the exceptions process should assiduously cultivate and jealously preserve independence from the kinds of political and bureaucratic influences to which policymaking, and especially rulemaking, activities are normally subject. He believed such independence was essential, due to the individualized nature of OHA decisions and the need to avoid any suspicion of impropriety in connection with decisions in which many millions of dollars in regulatory relief and important market advantages were often conferred upon individual firms and denied to their competitors.

Goldstein managed to wrest this autonomy for the OHA only over time and only through skillful bureaucratic tactics, including a threatened departure from the agency. He insisted upon the OHA's independence at every opportunity. By emphasizing the OHA's adjudicatory face, he was able to project the image of the detached decisionmaking and procedural integrity normally associated with the judicial model of decisionmaking. Although this appeal to the ethos of adjudication is belied by the strikingly legislative character of many OHA decisions, it appears to have been a singularly effective tactic in persuading the DOE political leadership, as well as members of Congress and their staffs, to respect the OHA's independence.

Goldstein confirmed and strengthened the OHA's autonomy in other ways. During the FEO and FEA periods, the OHA utterly dominated the committee that reviewed the exceptions decisions. The Administrator reviewed decisions only in the very rare case when the offices could not reach agreement. The first DOE organization plan, however, lodged the OHA within the ERA. The OHA was taken out of the ERA structure only after Goldstein insisted that if it were not, the independence of the exceptions process would be compromised. Instead, the OHA Director would report directly to the Secretary of Energy.[342] Goldstein also managed to neutralize the effect of section 504(b) of the DOE Act.[343] That section explicitly provided for appellate review of exceptions decisions by the quasi-independent Federal Energy Regulatory Commission (FERC). It accomplished this by mandating a new appeals process within the OHA as a prerequisite to seeking FERC review.[344] After departing from the DOE in February 1978, Goldstein agreed to return only upon the express condition that the jurisdiction of the administrative review committee created to review and clear exceptions decisions be confined to *final* OHA orders and not extended to grants or denials of temporary or interim relief.[345] According to several senior DOE officials, Goldstein avoided attending senior staff meetings unless specifically directed to do so by the Deputy Secretary, and thus missed most of them.[346] He met congressional inquiries about the status of pending exceptions cases with polite but firm reminders that the integrity of the process must not be compromised.[347]

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[337] No. 2 Home Heating Oil: Decision and Recommendations, [2 DOE] ENERGY MGMT. (CCH) ¶ 82,543, at 85,085 (1978).

[338] Class Exception, [1975 Transfer Binder] ENERGY MGMT. (CCH) ¶ 84,901 (1975).

[339] *See supra* notes 268-326 and accompanying text (Motor Gasoline case study).

[340] *See, e.g., supra* notes 248-67 and accompanying text (*Ohio Independents* case study).

[341] O'Leary interview, *supra* note 137.

Ultimately, the most important assurance of the OHA's autonomy was the commitment of the Department's political leadership to a policy of virtual noninterference with OHA decisions. This commitment reflected the Secretary's perception that Goldstein's political instincts, policy judgments, and conception of the exceptions process as an affirmative regulatory tool comported essentially with his own.

D. *Indeterminate Equitable Standards.*

Because the limits and inadequacies of rules usually make resort to equity seem necessary or prudent, one would expect equitable criteria to take the form of highly indeterminate standards. In fact, the OHA's exceptions criteria have been exceedingly broad. Energy legislation has always prescribed three standards; relief must be necessary to prevent (1) "hardship," (2) "inequity," or (3) "unfair distribution of burdens."[348] Beginning with the FEO period, the exceptions office elaborated these extremely ambiguous standards case-by-case, rather than developing them through rulemaking. Although a large number of routine cases could readily be decided in this way, the standards, even as elaborated, remained so broad that the office was essentially free to grant or withhold exceptions relief as it saw fit.[349] Even when the OHA published guidelines purporting to distill, from prior decisions, principles for predicting how it would decide future exceptions applications, most of the principles remained almost as indeterminate as the statutory criteria themselves. Other principles simply restated all of the facts of earlier cases without indicating which facts were determinative or how the OHA would weigh different decision factors in the future.[350] The guidelines also failed to clarify what particular remedy the OHA would grant once an exception was allowed.[351]

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[342] In practice, the OHA Director reported to the Deputy Secretary. Department of Energy Delegation Order No. 0204-24 (March 30, 1978).

[343] § 504(b), 42 U.S.C. § 7194(c) (Supp. V 1981).

[344] 44 Fed. Reg. 16,890 (Mar. 20, 1979); *cf.* Administrative Conference of the United States, Recommendation No. 80-2, *reprinted at* 1 C.F.R. § 305.80-2 (1983).

[345] Committee review of even final orders, moreover, was effectively aborted by Goldstein's control of the review process and his imposition of very short time limits for the other offices to submit objections. *See supra* notes 137-38 and accompanying text.

[346] Interview with Hazel Rollins, *supra* note 233; interview with Robert Montgomery, former General Counsel, FEA (May 21, 1982). Goldstein's own recollection differs. Telephone interview with Melvin Goldstein (December 30, 1982).

[347] Interview with David Schooler, *supra* note 182. Unlike many DOE bureaucrats, Goldstein did not protest against the OHA's offices being located at some distance from the building that housed the Secretary and Deputy Secretary. Interview with David Bardin, former ERA Administrator (June 1, 1982).

The OHA's indeterminate equitable standards, then, left its discretion largely unfettered, especially in "serious inequity" cases. Although its decisions were typically well-written and technically proficient, the equitable premises from which its reasoning proceeded remained largely undefined. This undermined essential discipline and control over its decisions, sometimes even causing observers who generally admired the OHA's work to view decisions as arbitrary and ad hoc. This is not to suggest, of course, that equity adjudication can or should be as predictable and principled as rule application. If such predictability were possible and desirable, rules would probably be preferable to adjudication as a decision mode.[352] The point, rather, is that the OHA's decisions were often less predictable and principled than even equitable adjudication needed to be.[353]

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[348] 42 U.S.C. § 7194 (Supp. V 1981).

[349] Occasionally, the OHA clarified its equitable criteria with considerable specificity. For examples, see *supra* notes 167-69 and accompanying text (the *Delta-Beacon* standard).

[350] *See, e.g.,* Ashland Oil, Inc., Gulf Oil Corp. [9 DOE] ENERGY MGMT. (CCH) ¶ 81,058 (July 19, 1982)(description of "gross inequity" criteria).

[351] *See infra* note 380.

[352] Of course, predictability is only one relevant factor. *See* Diver, *supra* note 10, at 71-79.

[353] Here, one may contrast the OHA's approach to that of the old Office of Price Administration, which refused to grant an exception unless its rationale was already embodied in a general standard; if that standard were met, however, relief would be granted as a matter of *right*. Interview with David Ginsberg, formerly of the OPA (July 21, 1982).

E. *Innovative Procedures.*

The DOE Act requires the Secretary to establish, by rule, procedures for seeking exceptions relief.[354] It also makes the APA applicable to "any rule or regulation, or any order having the applicability and effect of a rule" as defined by the APA,[355] and imposes certain additional procedural requirements for such rules, regulations, or orders.[356] The courts, however, have held that the OHA's exceptions decisions do not have "the applicability and effect of a rule."[357] Such decisions are not required by statute to be "on the record after opportunity for an agency hearing" and thus do not trigger the APA's formal procedural requirements.[358] Neither the APA nor specific energy statutes prescribes or even constrains the procedures for exceptions adjudications. The OHA has exploited this latitude by devising procedures that may be unique among federal agencies, procedures that are both a source of administrative effectiveness and a cause for concern.

Today,[359] a firm that desires exceptions relief must file an application with the OHA containing "all relevant facts" and legal authorities supporting relief; a hearing may be requested. The applicant must provide notice to anyone "who is reasonably ascertainable by the applicant as a person who will be aggrieved" by the relief sought, unless such notice would be "impracticable."[360] The DOE must notify anyone else whom it can identify as potentially aggrieved. Those notified may file written comments on the application. The OHA then investigates the application. It may solicit information from third parties so long as the applicant has an opportunity to respond, and it "may consider any other source of information."[361] At this stage, there are no restrictions whatsoever on ex parte communications.[362] After completing its investigation, the OHA ordinarily issues a Proposed Decision and Order (PD&O) on the application, publishing the substance of the decision in the *Federal Register* and inviting the public to file notices of objection (in the case of those "aggrieved") or of intent to participate (for those not "aggrieved" but wanting to participate). If no such notices are filed, the PD&O becomes final.

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[354] 42 U.S.C. § 7194(a) (Supp. V 1981).

[355] 42 U.S.C. § 7191(a)(1) (Supp. V 1981).

[356] This has been the case even when those exceptions decisions are actually indistinguishable from rules, as they often have been.

[357] 42 U.S.C. § 7191(b)-(g) (Supp. V 1981).

[358] United States v. Florida E.C. Ry., 410 U.S. 224, 241 (1973).

[359] The exceptions procedures issued as the Office of Exceptions and Appeals was forming in October 1974 remained largely unchanged up to the formation of the DOE in late 1977. Regulations prescribed requirements for notice, applications for exceptions and OEA orders, and appeals within the OEA, but provided little else. 39 Fed. Reg. 35,489 (1974). After the DOE Act lodged appellate review over exceptions decisions in the FERC, *see supra* note 343, the OHA responded by instituting a two-step, quasi-appellate "Proposed Decision and Order/Final Decision and Order" process, as well as additional procedural accoutrements that now characterize the exceptions process and that are summarized in the text. 44 Fed. Reg. 16,887 (1979). These include, among other things, prohibitions on ex parte contacts, discovery procedures, provisions for different kinds of hearings, comment procedures, and temporary and interim orders.

[360] 44 Fed. Reg. 16,886-88 (1979).

[361] *See id.* at 16,890.

If objections are filed, the OHA compiles an official service list, including additional participants (who may be required to employ a lead or common counsel). A party or participant that wishes to conduct discovery on disputed material facts then files a Motion for Evidentiary Proceeding.[363] If the OHA grants an evidentiary hearing, the presiding officer may require only affidavit or documentary evidence, or otherwise limit the quantity and form of evidence. After all issues have been delineated and written materials submitted, the OHA may conduct a hearing for purposes of oral argument only; here, as in OHA proceedings generally, the presiding officer enjoys broad discretion to control all aspects of the argument. Once a PD&O is issued, the OHA may grant interim relief pending a Final Decision and Order (FD&O) with a statement of factual and legal basis.[364] Appeals from a denial of exceptions relief must be taken to the FERC in order to exhaust administrative remedies.[365]

Two of the OHA's greatest administrative strengths—its ability to process a large caseload and to decide important cases quickly—directly reflect the informality of its procedures. Until the motor gasoline crisis of 1978-1979,[366] the OHA managed to avoid significant case backlogs, and its decisions were generally regarded by the Washington energy bar as being of high professional and intellectual quality. As the *Union*, *Ashland*, and *Ohio Independents* case studies indicate, the OHA was capable of providing immediate relief whenever it appeared that delay would be tantamount to denial.[367] In a federal establishment in which cases of no greater complexity and policy significance can take years to decide, the OHA's expedition and decisiveness are undeniable achievements widely admired even by those who disagree with the merits of particular decisions.

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[362] Ex parte communications between a party or participant and relevant OHA officials are not limited until the PD&O is issued. Thereafter, such communications are prohibited, but the prohibition does not cover requests for status reports, inquiries as to procedures, or submissions of confidential data under the appropriate rule. If prohibited communications occur, the OHA must make their substance public, notify all participants, and may take other remedial action.

[363] OHA procedures prescribe a hierarchy of evidentiary methods—the most preferred being the submission of written materials, then written interrogatories, then depositions, and then evidentiary hearings—and the party or participant seeking the information bears the burden of justifying use of a less preferred method. The OHA may summarily deny such a motion if it is insufficiently specific, unduly burdensome, or would cause undue delay. Procedures for obtaining and protecting confidential information are also provided. OHA decisions on evidentiary matters are interlocutory and are appealable only with the Final Decision and Order (FD&O).

[364] The OHA may issue an FD&O without first having issued a PD&O.

[365] The FERC has construed its appellate jurisdiction over OHA orders quite narrowly. *See infra* note 403 and accompanying text. The OHA may issue temporary stays pending appeal and may entertain requests to modify or rescind previous DOE orders.

[366] *See supra* notes 268-326 and accompanying text.

But the procedural coin has a second side. The OHA's procedures have also occasioned bitter, persistent criticism among many lawyers who practice before the agency.[368] Although dissatisfaction generally centers on the summary, informal nature of these procedures, nine aspects of OHA procedure have engendered particular criticism. These relate to: notice; discovery; ex parte contacts; cross-examination; lawyers' testimony; interim relief; mixture of functions; the system of internal DOE review; and consumer participation.

Before examining some of these aspects of OHA procedure, several important contextual factors common to all should be mentioned. First, the OHA's procedures were premised upon a continuing state of *emergency*, a situation in which relief often must be granted immediately if it is to be effective at all. Although reasonable people can certainly differ on the questions of the causes, nature, and duration of the emergency, most observers would agree that the particular crisis in which the exceptions process was born did not continue for very long.[369] Nevertheless, it was not until 1978-1979 that the OHA modified its highly informal procedures to provide the safeguards that the original emergency had arguably rendered impractical.[370]

Second, the *appearance* of procedural fairness in the exceptions process was especially important. Indeed, it was almost as important as the reality. Voluntary compliance is arguably indispensable to the success of any regulatory program but it was particularly vital for energy controls. A combination of the oil industry's fierce competitiveness and the DOE's weak enforcement[371] made cheating a great temptation. In those circumstances, any widespread perception among regulated firms that regulatory decisions were unfair or incompetent could undermine the integrity of the program.[372] Several aspects of OHA procedures created difficulties in this regard.[373]

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[367] *See supra* text accompanying note 267.

[368] This is especially true of those whose clients (primarily the major integrated oil companies) tend to oppose exceptions relief.

[369] Only the two acute shortages of winter 1973-1974 and spring 1979 clearly qualified as full-fledged emergencies.

[370] *See generally* 10 C.F.R. § 205 (1983).

[371] Enforcement was virtually nonexistent in areas such as retail motor gasoline.

a. *Notice*. OHA regulations require some form of party or OHA-initiated notice at all stages of the process to persons potentially "aggrieved" by exceptions relief.[374] Although ample notice has been provided in most cases, especially those in which a PD&O is issued, it has sometimes been inadequate at earlier stages, such as the period before interim relief is issued.

Exceptions relief has sometimes adversely affected firms other than those to whom OHA procedures assured notice. Relief to refiners under the entitlements program is a striking example. Because purchases of entitlements created a pool of funds available to those who were allowed to sell them, any sale of entitlements meant both that entitlements purchasers must buy a greater amount and that the entitlements sellers could only sell a smaller amount. Thus, while the largest refiners with access to controlled "old oil" were obliged to pay the most,[375] exceptions relief under this program affected *every* refiner and its customers to some degree. In the early stages of OHA's *Delta-Beacon* small-refiner relief program, notice procedures sometimes failed to take account of even those interests most significantly affected. Occasionally, the major refiners most heavily burdened by the relief neither received formal notice nor otherwise participated in the proceeding.[376] As the magnitude of *Delta-Beacon* relief grew, however, the majors began to participate more regularly and the OHA eventually adopted a policy requiring initial notice to the largest refiners to inform them of general changes in *Delta-Beacon* standards, such as the *Warrior* adjustment.[377]

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[372] This may explain why many local service stations apparently violated motor gasoline pricing and allocation regulations during the regulatory breakdown in the spring of 1979, when small dealers could be driven out of business long before the DOE managed to get around to granting relief. *See supra* notes 323-25 and accompanying text.

[373] For a more detailed discussion of specific OHA procedures, see P. SCHUCK, *supra* note 50, at 155-77.

[374] *See* 10 C.F.R. § 205.123 (1981)(notice to adversely affected parties at temporary exception stage); 10 C.F.R. § 205.53 (1981)(notice to adversely affected parties at permanent exception stage); 10 C.F.R. § 205.57 (1981)(publication of proposed decision and order in *Federal Register*).

[375] Exxon, for example, estimated that it had to purchase almost 10% of the total entitlements.

[376] This was true of *Pasco, Inc.* and the first round of small-refiner exceptions cases generally. *See supra* notes 147-57 and accompanying text.

[377] *See supra* notes 199-201 and accompanying text. Of course, few of the firms receiving actual notice would contest most individual cases; it was not worthwhile for every company to oppose relief in every instance.

Allocation rules, like the entitlements program, created a zero-sum game in which exceptions relief granted to one party necessarily came at the expense of others. Typically, relief required some firms to divert a portion of their supply of crude oil and refined products to the exceptions applicant, a remedy that could only be accomplished by reducing the allocations supplied to existing customers. Yet the firms actually subsidizing the exceptions relief ordinarily received no formal notice even though the ongoing proceedings endangered their own supplies.[378] Moreover, a later challenge to the validity of relief based upon lack of notice would be difficult to sustain, as even suppliers faced a heavy burden of proof to invalidate an OHA order.

The OHA's remedial innovations also caused occasional notice problems. The notice required by OHA regulations generally extended only to those entities that would be aggrieved by the relief that the applicant had requested. But when the OHA fashioned a different form of relief or relief that affected unexpected entities,[379] or when its relief affected entities which failed to receive initial notice, those entities might lose any opportunity to present their claims until after the OHA decided the cases.[380]

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[378] This was the case in the vast majority of the retail service station cases during the motor gasoline crisis.

[379] In one case, for example, the OHA directed a company with relatively small and insecure petroleum operations to be a supplier, basing the assignment upon the firm's large *total* assets. *See* Transcript of Proceedings, *In re* Energy Coop., Inc. Nos. BEE-0508, BES-0508, BEL-0508, BSO-009 (Jan. 18, 1980), at 140-42. Seldom did the OHA explicitly analyze why one firm rather than another should be pressed into remedial service. As the exceptions program developed, however, the OHA grew more sensitive to the notice-of-remedy problem and even ordered the ERA regional offices, which identified potential suppliers in certain kinds of exceptions cases, to provide more adequate notice. *See, e.g.,* Vickers Petroleum Corp., [7 DOE] ENERGY MGMT. (CCH) ¶ 80,183 (Jan. 27, 1981).

[380] This occurred in the *Ashland* case. *See supra* notes 240-47 and accompanying text. Another case that originated during the 1979 gasoline crisis illustrates the problem of notice concerning remedies. A Missouri gasoline jobber, Onyx Corp., claimed to be suffering severe financial hardship from the high prices charged by its base period suppliers, and sought an OHA order designating a lower-priced base period supplier. The OHA followed a two-step process. First, the OHA decided that the claimed hardship in fact existed. Then, the OHA delegated the task of assigning a new supplier to an ERA regional office because of its greater familiarity with prevailing local market conditions (and doubtless because the OHA itself was then suffering from a severe case backlog). Mobil Oil, the eventual supplier, was not notified of the PD&O in the case or of the accompanying decision to provide interim relief. Six working days after issuance of the initial decision by the OHA, the ERA informed Mobil by telephone that it might have to supply Onyx. When Mobil objected, it was told that it could submit objections concerning the possible assignment to the ERA regional office. The next day, the ERA again telephoned to inform Mobil that it would be the new supplier. The FD&O directing Mobil to supply Onyx was issued one day later.

Mobil appealed the assignment order to the OHA, claiming inter alia that its inability to contest the original exception application, because of lack of notice, violated due process and DOE rules. The OHA rejected Mobil's appeal, pointing to Mobil's notice of the assignment itself, Whether absence of notice ever affected substantive rights, of course, is difficult to discern. Generally, OHA officials felt that large companies would not incur harm in such cases even if full restoration of the status quo ante was impossible. The OHA typically assigned large companies to be suppliers either because they had more product available or because their prices were lower. Many firms may have failed to object to assignments or other remedies made without notice not because the remedy was unobjectionable but because the companies expected the OHA to affirm its own prior decision or because the amounts involved simply did not warrant incurring extensive legal costs.[381]

2. *Discovery.* The OHA limited parties' discovery rights to minimize costs and delay.[382] On a few occasions, the OHA permitted discovery when additional information seemed vital to a high quality

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its opportunity to contest it on appeal, and its opportunity to contest the original exception before issuance of the FD&O. The OHA emphasized, furthermore, that giving prior notice of the exception proceeding would unduly burden the applicant and the DOE:

> It would surely be an unduly narrow view of the test which the Supreme Court enunciated in the *Eldridge* case to require a firm that is requesting urgent exception relief because it is facing the imminent possibility of going out of business to notify each of these fifty suppliers of the pendancy of the exception proceeding. Similarly to place this requirement on the DOE and to accompany it with the further requirement that written and oral comments from each of these fifty firms be considered before any action whatsoever is taken would seriously undermine the exceptions process and jeopardize the realization of the Congressional objectives.

Mobil Oil Corp., [4 DOE] ENERGY MGMT. (CCH) ¶ 80,158, at 80,842 (Sept. 21, 1979).

The notion of efficiency implicit in this rejoinder, however, seems unduly narrow, especially in light of the difficulty, discussed earlier, of restoring the status quo ante if the OHA erred in deciding a nonadversarial case. For example, in a similar case in which the OHA ordered the ERA to make a new assignment in an exception proceeding without OHA notice to the eventual supplier, reversal of the assignment order for two of the twelve suppliers did not occur until more than eight months following the new assignments and five months after they were to take effect. Ashland Oil, [6 DOE] ENERGY MGMT. (CCH) ¶ 82,534 (July 28, 1980). In both *Ashland* and *Onyx*, the gasoline shortage that precipitated the exception requests had mostly disappeared by the time the OHA reversed its decision. The OHA, the applicants, and potential suppliers also expended a great deal of time and money in additional proceedings that might have been unnecessary had notice been available in the initial proceeding. Further, it is not at all clear that the comments that broader notice might have elicited would, as the OHA feared, "seriously undermine the exceptions process." Potential suppliers in most allocation cases tended either not to respond to notice or to respond with very general comments; the additional burden on the OHA from comments, then, would be slight, while the benefits might be significant in cases such as *Onyx*.

381. Interview with Jack Blum, Independent Gasoline Marketers' Council representative (June 22, 1982). In temporary exceptions cases, shortness of notice, as epitomized in the *Ashland* proceeding, *see supra* note 317, occasionally posed problems not unlike those posed by complete lack of notice. But *Ashland* was unquestionably an unusual case. In general, the short notice provided before temporary exceptions hearings appears to have been justifiable in light of regulatory requirements aimed at speedy emergency action.

382. *See* P. SCHUCK, *supra* note 50, at 164.

PD&O.[383] The OHA realized that even in an emergency requiring an expeditious decision, categorical restrictions on discovery could not always be justified. Even now, discovery of nonconfidential information can be made only after a PD&O issues and objections and responses are filed. The OHA generally has rejected requests for pre-PD&O discovery. The OHA has, however, permitted pre-PD&O discovery in two kinds of situations—where the disputed issues may be certain enough to permit the appropriate limits of discovery to be discerned at an early stage, and where denial of early discovery would render the PD&O itself largely useless.[384]

Both bases for early discovery are potentially broad in scope. They reflect a belated recognition by the OHA that such discovery may often improve the quality and efficiency of its PD&O's and that the emergency that arguably necessitated OHA's summary procedures can no longer justify categorical restrictions on discovery. In contrast, the case for limiting discovery at the temporary exception stage, where the need for urgency probably outweighs the improvement in decisional accuracy that discovery may yield, is more convincing.

3. *Ex parte contacts*. Before March 1979, the OHA did not prohibit ex parte contacts in exceptions cases. Even today, ex parte contacts are only barred after the OHA issues a PD&O. Two types of ex parte contacts can occur between the OHA and applicants for exceptions relief. The first type—off-the-record meetings between OHA officials and applicants' representatives—seems relatively rare. The most notorious example occurred in the *Ashland* case.[385] The second type of ex parte contact is more prevalent, perhaps even common. When OHA analysts need more information to complete their evaluation of any ap-

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[383] *Id.* at 164-65.

[384] *See* Ashland Oil, Inc., [9 DOE] ¶ 84,002 ENERGY MGMT. (CCH) (1981), where the OHA found that information about accounting techniques that various companies might have used was essential to establishing whether Ashland had a valid exception request. *Id.* at 87,012-13. This decision could permit early discovery in any case in which an applicant can show that the information it seeks may be essential to its participation in the exceptions proceeding.

[385] *See* P. SCHUCK, *supra* note 50, at 166-67. Seven Ashland representatives met with five officials from the OHA, including the Director, before Ashland had even filed an exception application. Although the meeting was not transcribed, Ashland's lawyer later recounted that Ashland informed the OHA about the application it intended to file and discussed such procedural questions as notice and the date of the hearing. Although those present denied that any substantive aspects of the case were discussed, the mere holding of such a meeting, coupled with its off-the-record character and the extraordinary relief that Ashland quickly obtained, created at least the appearance of possible improper influence over the OHA. According to one lawyer experienced in OHA proceedings, such "procedural meetings could be a valuable vehicle for a subtle form of persuasion . . . . ; "By turning Mel onto an interesting issue or innovative remedy, which could often be done in such an encounter," one might increase the probability of even that relief.

plication, they often telephone the applicant to request the additional facts.[386]

4. *Cross examination*. As noted earlier, OHA regulations permitted cross-examination in ordinary exceptions proceedings only if less time-consuming methods of interrogation (such as requests for documents or written interrogatories) are unavailing and the OHA presiding officer authorizes it. The regulations do not specifically authorize cross-examination in temporary exceptions cases, but the OHA has sometimes permitted it.[387] Even where permitted, however, cross-examination is often less extensive than some parties may wish in temporary exceptions proceedings. In the *Ashland* temporary exception hearing, attorneys were sometimes limited to one question; in one instance, Goldstein ruled the single question out of order and refused to allow another.[388] The OHA's procedures on cross-examination, especially in temporary exceptions hearings, also sometimes denied opposing parties much prior notice of an applicant's evidence.[389] Moreover, the OHA's requirement that the applicant mail a copy of its application to affected parties did not pertain to whatever information that applicant deemed confidential.[390] Without pre-hearing discovery, therefore, an applicant could subvert effective cross-examination further by retaining essential information as confidential.[391]

For the most part, presiding officers took the place of the cross-examiner, often pursuing lines of questioning that cross-examination would probably have covered. In this inquisitorial role, they attempted to project the skeptical attitude they felt was necessary in a process designed to grant relief only in extraordinary cases.[392] The parties' opportunity to cross-examine came only after the presiding officer had finished questioning that witness. Although according the presiding officer priority in questioning is not objectionable, the OHA-imposed time limits on attorneys and the parties' inadequate access to information relevant to cross-examination may well have prejudiced some parties, preventing or discouraging them from effectively presenting their arguments. Unfortunately, the magnitude of this risk is difficult to measure.

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[386] During the flood of gasoline retailers' applications in 1979, many applications were incomplete and some showed a total misunderstanding of the standards for relief. As a result, the OHA analysts often called applicants to explain the standards and sometimes discussed the merits of the application; written records of the substance of such calls were not always kept. To be sure, the immense case backlog and sense of crisis that then prevailed encouraged, and perhaps even justified, these more informal means for disposing of cases. Yet complaints about such ex parte communications extended to other exceptions decisions as well.

[387] *See, e.g., Ohio Independents* Transcript, *supra* note 250.

[388] Goldstein also ruled that parties could question Ashland only during 10 to 15 minute presentations. Although Goldstein evidently imposed these restrictions in the interest of brevity, his desire to conduct the *Ashland* hearing in one day rather than two, and the *Ohio Independents* hearing in less than one, seemed a more important motivation than the inherent urgency of the situation. Even in an emergency, the delay that would have resulted from a somewhat longer hearing was probably insignificant. *See, e.g., In re* Ashland Oil Co., Nos. BEE-0373, BEL-0373, & BSG-0007, at 125-26 (official transcript of proceedings).

[389] *See* P. SCHUCK, *supra* note 50, at 168-69.

[390] *See* 10 C.F.R. § 205.53(a) (1975).

[391] *See* P. SCHUCK, *supra* note 50, at 169.

5. *Lawyers' testimony*. In OHA hearings, lawyers often testify in lieu of their clients. This practice may have helped the smaller, less sophisticated applicants, especially gas station owners. A trained lawyer might be able to present a case for relief more effectively than a company employee, and a company might find it too costly to send employees to Washington or even to a regional center to testify.

Nevertheless, as a general practice, the substitution entails several difficulties. Outside counsel are unlikely to be as well-informed in the relevant respects as an applicant's own employees. When, as often happens, no employee even attends the hearing, less information, or less reliable information, may be produced. Lawyers' testimony, after all, is hearsay, often double or triple hearsay. They may be misled themselves, inadvertently presenting distorted data out of ignorance or detachment from the operative facts. The infrequency of sworn statements may increase this risk.

6. *Interim relief*. As *Ashland*, *Ohio Independents*, and many retail gasoline allocation cases demonstrate, the OHA often provided expedited relief to applicants before issuing a PD&O and, indeed, even before submitting a draft PD&O for internal departmental review. Such relief was crucial to the effective operation of the exceptions process.[393] Although decisions erroneously granting temporary relief can in principle be corrected later, the consequences of that relief often can-

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[392] *See, e.g., In re* Ashland Oil Co., Nos. BEE-0373, BEL-0373, & BSG-0007, at 29-56 (official transcript of proceedings)(questioning Ashland officials).

[393] *See supra* notes 216-18 and accompanying text. The large number of temporary exceptions, temporary stays, and interim decisions and orders, particularly as a fraction of the 1305 PD&O's issued from September 1977 to early May 1982, demonstrates the importance of such temporary relief. After the PD&O procedure was instituted in late 1977, the OHA issued a total of 411 such temporary exceptions and stays, including relief to 237 gasoline stations. In an even larger number of cases, the OHA provided "standby" relief when it issued a PD&O, pending its confirmation by a FD&O. Information supplied by Tom Wiecker, OHA Deputy Director.

not.[394] In practice, temporary relief, sometimes granted after only the most summary kind of hearing, can be almost tantamount to permanent relief. By the time the FD&O was issued in *Ashland*, for example, two and one half years had passed;[395] the Iranian boycott and rapidly escalating crude prices had given way to a worldwide glut and to stable or declining crude prices. Even though the FD&O found some of Ashland's relief to have been improperly granted, the $5.7 million in restitution that the OHA finally required Ashland to pay did not alter the fact that Ashland had received the relief it requested when it felt it needed it. Moreover, the OHA's failure to require firms to pay interest on the value of relief granted erroneously and later withdrawn meant that Ashland received what amounted to an enormous interest-free loan.[396] By failing to require payment of interest on the relief, the OHA prevents restoration of the status quo ante even where the return of the relief itself can somehow be accomplished.

There are additional reasons why interim decisions, even if erroneous, are difficult to correct subsequently. An earlier decision acquires a powerful psychological momentum that may discourage subsequent reversal, especially by the same decisionmaker. It may also engender expectations as well as economic and political commitments that generate compelling new equities, thereby making reversal difficult or even unjust. An entirely different economic universe may have evolved in the interim; remedial solutions necessary to correct the earlier error may no longer be fair, sensible, or workable. Under these circumstances, it doubtless is tempting to uphold, rather than reopen, the original decision.

The tendency of temporary (or indeed final) relief to have irreversible effects is, of course, an inevitable feature of any regulatory system that seeks to address an emergency of only limited duration. Conversely, the erroneous denial of relief in the midst of an emergency, if it precipitates bankruptcy or other irreparable injury, can never be fully rectified after the fact either. It is likely that many such erroneous denials of relief occurred during the motor gasoline crisis, when the OHA's caseload simply overwhelmed its decisionmaking capacities.[397]

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[394] Sometimes the OHA reversed its earlier order but did not even attempt to return the erroneously granted relief. *See, e.g.*, Gulf Oil Corp., [9 DOE] ENERGY MGMT. (CCH) ¶ 80,157 (April 21, 1982).

[395] *See supra* notes 245-47 and accompanying text.

[396] In granting Ashland a stay pending appeal of the OHA's final restitution order, the OHA for the first time imposed an interest obligation, running from the date of that order—two and a half years after the original FD&O.

[397] *See supra* notes 323-25 and accompanying text.

7. *Mixture of functions.* In addition to deciding exceptions applications as an original matter, the OHA exercises appellate jurisdiction in several important areas.[398] The OHA, for example, approves and issues remedial orders that the ERA proposes and wishes to enforce.[399]

The OHA has managed to retain effective control over the appellate process despite considerable congressional concern with the problem of appeals from OHA exceptions decisions. The Energy Conservation and Production Act of 1976, for example, amended the exceptions authority provided by the EPAA to require that "no review of a denial under this subparagraph shall be controlled by the same officer denying the adjustment pursuant to this subparagraph."[400] The OHA easily neutralized this requirement by assigning appellate review of exceptions decisions to different OHA staff members than those who wrote the decisions. In the Department of Energy Organization Act, Congress again attempted to assure independent appellate review by requiring that exceptions decisions be appealed to the FERC.[401] Again, the OHA made external review more difficult and remote by instituting the two-step procedure of a PD&O, then a FD&O. This interposed what amounted to an additional appellate layer through which aggrieved parties must pass on their way to FERC review.

Quite apart from the OHA's maneuvers, however, neither the FERC nor the TECA has typically used its appellate jurisdiction to control the exceptions process. The TECA has accorded exceptions decisions conspicuous deference, emphasizing the complexity of the industry and the need for flexibility and expert analysis.[402] The FERC, in a judicially approved construction of its statutory review authority, has declined to review grants of exceptions applications.[403]

A second mixture-of-functions problem concerns the combination of the OHA's exceptions jurisdiction with its appellate jurisdiction over remedial and enforcement orders by other DOE offices. Uniting these functions compels the OHA to perform fundamentally inconsistent roles. In exceptions matters, the OHA is expected to coordinate its decisions closely with the ERA and other policy and enforcement arms of the DOE through informal discussions and through the more regularized departmental review structure. But when it sits to review proposed remedial and enforcement orders of the ERA and other offices, the OHA is no longer the consulting colleague but rather must play the detached, independent judge evaluating the arguments of prosecutors. In the appellate review context, each actor is bound by strict limitations on ex parte communications with the other. The OHA has sometimes violated these limitations.[404]

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[398] *See* 10 C.F.R. § 205.100 (1982).

[399] *See* 10 C.F.R. § 205.190-205.199J (1982). This study does not analyze or discuss the OHA's appellate activities, except insofar as they have created potential sources of procedural unfairness with respect to the OHA's exceptions jurisdiction. *See, e.g.,* Aman, *Institutionalizing the Energy Crisis: Some Structural and Procedural Lessons*, 65 CORNELL L. REV. 491 (1980)(containing analysis of OHA appellate activity).

[400] Energy Conservation and Production Act, 90 Stat. 1125, 1128 (1976)(codified at 15 U.S.C. § 766(b) (1982)); *see also* Aman, *supra* note 399, at 551-63.

[401] *See supra* notes 343-44 and accompanying text.

[402] *See, e.g.,* Pasco v. FEA, 525 F.2d 1391, 1404 (Temp. Emer. Ct. App. 1975). *But see* Husky Oil Co. v. DOE, 582 F.2d 644, 653 (Temp. Emer. Ct. App. 1978)(denial of application held to be arbitrary, capricious, and discriminatory).

[403] *See* Texaco, Inc. v. DOE, 663 F.2d 158, 167-68 (D.C. Cir. 1980). The shift toward this position began as early as Lunday-Thagard Oil Co., No. RA78-1 (F.E.R.C. Nov. 16, 1979).

Indeed, the OHA might be obliged to decide the same legal question twice, once while wearing its consultative policymaker hat and once while wearing its independent adjudicator hat. For example, the OHA was called upon to review the legality of the ERA's interpretation of the status of refiner processing agreements under the entitlements program as a remedial and enforcement matter.[405] There, the ERA was simply an advocate pleading its case to the OHA, the neutral judge. But the OHA decided the same issue in formulating its *Delta-Beacon* standards for small-refiner relief.[406] There, it sat on the same side of the table as the ERA, its regulatory colleague.

8. *Administrative review committee*. The problems associated with the internal departmental review committee—particularly its inability to act as a check on OHA decisions and on the DOE's refusal to divulge the grounds for altering previously rendered decisions—have been discussed above.[407]

9. *Consumer participation.* The adversary process in exceptions cases may sometimes have been inadequate to develop a full record and to discipline the OHA's decisions because firms had little reason to resist exceptions relief granted to suppliers when they could pass the resulting costs along to consumers. Yet involvement by consumer-ori-

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[404] *See, e.g.,* Gulf Oil Corp. v. United States Department of Energy, 663 F.2d 296, 302-03 (D.C. Cir. 1981).

[405] *See, e.g.,* Phillips Petroleum Co., [1976-1977 Transfer Binder] ENERGY MGMT. (CCH) ¶ 87,008 (Jan. 19, 1977)(petition for special redress concerning ERA enforcement action).

[406] *See supra* notes 153-205 and accompanying text.

[407] The problems associated with the internal departmental review committee—particularly its inability to act as a check on OHA decisions and on the DOE's refusal to divulge the grounds for altering previously rendered decisions—have been discussed earlier. *See supra* notes 135-39 and accompanying text; *see also* Colonial Oil Co., [1 DOE] ENERGY MGMT. (CCH) ¶ 82,519 (Dec. 21, 1977).

ented organizations in exceptions proceedings was rare. State government representatives participated in isolated instances, such as in the *Ashland* proceeding, but direct representation by a consumer organization occurred only once. In 1976, when several large refiners sought a class exception that would allow them to pass $1.3 billion through in increased nonproduct costs, the Consumers Union filed a Petition for Special Redress seeking appointment of publicly financed representatives for consumers in the proceeding. The FEA, granting the petition, published a *Federal Register* notice that invited consumer representatives to intervene and offered such groups financial assistance to do so.[408] The Consumers Union applied, was accepted, and participated in both the proceeding and the court case that stayed the grant of the class exception.[409]

After 1978, Congress effectively eliminated participation by nonindustry groups altogether when it ruled out public funding for intervenors like the Consumers Union.[410] But it is difficult to say whether and to what extent a higher level of participation in DOE rulemaking by nonindustry groups would have enhanced the quality of that process. First, most exceptions proceedings were quite narrow in focus and impact; consumer participation in such proceedings might not have been worth the cost. Furthermore, when an individual exceptions case had significant public interest ramifications, an adversary relationship would sometimes develop between different segments of the industry; conflicting interests among companies could have the effect of indirectly representing consumers' interests. The major integrated companies, for example, often found themselves arguing against excessive subsidies to small refiners, while the small refiners based their claims for protection partly on the lower consumer prices they said would result from increased competition in the industry. Finally, Goldstein and the OHA staff claim to have made a conscientious effort to take into account the interests of consumers in exceptions proceedings, even when no consumer groups participated.

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[408] 41 Fed. Reg. 33,282 (1976).

[409] In June 1979, three months after the rehearing in the court case was denied, Consumers Union applied for $14,469.35 in attorney's fees for its role in the hearing before the OHA. The OHA, citing the low fees requested and the pro bono participation by Consumers Union in the court proceedings and other aspects of the case, granted the request in full. Consumers Union, [6 DOE] ENERGY MGMT. (CCH) ¶ 82,555 (Sept. 19, 1980). The potential effect of this enormous cost pass-through on consumer prices, and wholesalers' and retailers' weak incentives to contest it, persuaded the FEA that adversarial intervention by a consumer group was justified. Most other exceptions cases, however, involved fewer refiners and a less direct economic effect on consumers. This fact, along with the technical complexity of most issues in exceptions cases, discouraged participation by nonindustry groups.

[410] *See* 1980 Fiscal Year Appropriations Bill for Energy and Water Development § 103, Pub. L. No. 96-69, 93 Stat. 441 (1980).

F. *Latent Functions: The Exceptions Process as Safety Valve.*

The OHA's exceptions process exemplifies an observation made in a celebrated book by sociologist Robert Merton, in which he contrasted what he called the "manifest and latent functions" of a sociological system. To Merton, a manifest function consists of the objective consequences of a system that "contribute to its adjustment or adaptation and were so intended."[411] A latent function consists of the system's "unintended and unrecognized consequences."[412] The OHA exceptions process exhibits a number of functions, some more latent than manifest, whose common feature is that they operate as "safety valves" in the regulatory system. To evaluate fully the operation and significance of the exceptions process, we must understand the pressures that make such safety valves seem necessary, how these devices work to relieve those pressures, and what new problems they create for the regulatory system.

The safety valve metaphor is quite general; it does not specify the kinds of pressures that it is designed to ease. Conventionally understood, the exceptions process eases the demands for equity generated by special hardships or unforeseen circumstances. That is what the late Judge Harold Leventhal evidently had in mind when he called it "an essential safety valve of the regulatory process."[413] The federal courts have sometimes regarded the existence of such a safety valve as a factor relevant to, although not necessarily determinative of, the validity of general rules.[414]

Exceptions for hardship and unforeseen circumstances constitute the "bread and butter" of the DOE exceptions process, surely accounting for the vast majority of the OHA's decisions.[415] Such relief, which corresponds to Aman's "fairness" and "hardship" exceptions,[416] performs important safety valve functions. By reducing the hardships and the sense of injustice suffered by those to whom a rule applies, exceptions diminish the pressure to challenge the rule itself. But this equitable safety valve function entails risks and problems. Judge Leventhal characterized one of them this way:

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[411] R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 19, 63 (1957).

[412] *Id.* at 63.

[413] Leventhal, *Principled Fairness and Regulatory Urgency*, 25 CASE W. RES. L. REV. 66, 77 (1974).

[414] Indeed, two Justices of the Supreme Court were evidently prepared to hold that an agency must provide an exceptions process if its general rules are to be upheld. FCC v. WNCN Listeners' Guild, 450 U.S. 582, 604 (1981)(Marshall, Brennan, J.J., dissenting).

[415] Interview with Tom Wiecker, OHA Deputy Director (June 18, 1982).

[416] *See supra* text accompanying note 71.

> Care must be taken that the rule be proved and not swallowed by the exception. . . . A safety valve is one thing, a dissipation of all force another. Care must also be taken lest [exceptions] be granted waywardly and willy-nilly, justified by little more than the exigencies or protests of the day.[417]

By all accounts, the OHA did not grant exceptions relief "willy-nilly." In its early years, the OHA applied what several observers described as a "tombstone" standard for relief; a firm could not hope for an exception unless it was on the verge of going out of business. Even later on, when the exigencies of the original crisis abated somewhat and the OHA seemed to relax its application of this standard, applicants were obliged to overcome a heavy presumption against relief.[418] Only during the motor gasoline shortages of 1978-1979 did the OHA seem to grant relief "at wholesale," as it were. When this occurred, Leventhal's warning proved prescient.[419]

Just as the limits of rules, the hardships and aberrations they produce, represent only one set of reasons for which agencies seek regulatory equity,[420] so the need for equity is only the most obvious of the safety valve functions that the exceptions process performs. For example, the OHA has also provided DOE program administrators with safety valves of a political and bureaucratic nature, and these threaten administrative law values far more than the mere pursuit of equity in the application of rules.

In the politically overheated atmosphere of energy policy during the 1970's, top energy officials found in the OHA the cooling breeze that they so desperately needed. "Leave it to Mel!" came to be the watchword of harried officials looking for a quick fix; it was a liberating device for policymakers who felt shackled by legal and political constraints. The roots of this strategy can be traced to Congress. From the beginning, Congress regarded a flexible exceptions process as a politically and programmatically essential component of a viable system of energy price and allocation controls. All of the legislation authorizing energy regulation, from the original Economic Stabilization Act through the DOE Act, provided for the granting of discretionary exceptions. Indeed, it is possible, although difficult to demonstrate, that these laws would never have been enacted had not such a process been provided.[421]

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[417] Leventhal, *supra* note 413, at 78.

[418] *See Gasoline Hearings*, *supra* note 291, at 64 (27.5% approval rate for exception relief during crisis).

[419] *See supra* notes 322-24 and accompanying text; *see also* Comment *supra* note 6, at 1154-57.

[420] *See supra* Part I.

To energy administrators, the exceptions process was equally essential. When congressional and industry complaints about the breadth, rigidity, and categorical nature of controversial energy regulations grew bitter, energy officials could often defuse this opposition by emphasizing that an exceptions process, capable of producing the desired flexibility, was available to handle any difficulties that might arise. As in *Ashland*, White House staff members or departmental leaders would sometimes urge powerful opponents of particular rules to apply for exceptions relief; indeed, they might even alert OHA Director Goldstein that applications would soon be forthcoming. When the OHA did grant an exception, as in *Ashland*, the opponents would no longer have to invest political capital in seeking changes in the rules themselves.

This tactic of encouraging opponents to seek an exception deflected much potential pressure from the DOE's political appointees to the OHA's civil servants. Because the deflected pressure could not be brought to bear effectively against the OHA, much of it was dissipated. With great skill, Goldstein managed to insulate his agency from day-to-day congressional influence. During the gasoline crisis in 1979, the OHA had three full-time employees responding to case inquiries from congressional offices. Goldstein and a deputy personally handled all direct calls from senators or representatives about pending cases and successfully fobbed them off by emphasizing the adjudicatory nature of the proceedings and the risk to all concerned of even an appearance of outside pressure on the tribunal.[422] Here as elsewhere,[423] Goldstein was able to draw upon the mystique, ethos, and traditions of judicial autonomy to assure the OHA broad operating freedom. By wrapping the OHA in the adjudicatory mantle, he could obscure the fact that the OHA was deeply immersed in the design and implementation of controversial regulatory policy. This camouflage promoted the OHA's own bureaucratic interests. More importantly, however, it insulated the DOE's political leadership from some potential criticism and pressure.

The exceptions process created other bureaucratic safety valves for the Department. First, it seemed to relieve some administrative pressures created by the ERA, a regulatory apparatus that simply was not equal to its awesome statutory responsibilities. Even those who ran the ERA readily acknowledged its dispirited and mediocre staff, sluggish procedures, inadequate information base, stalemated political and bureaucratic interests, and chronic indecision.[424] We have seen that even under the best of circumstances, controversial rulemaking has become a protracted, tortured process. At the ERA, adopting new rules or improving old ones within a policy-relevant time frame was always problematic, sometimes impossible.

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[421] For a somewhat similar inquiry, see the Supreme Court's discussions of the severability issue in Immigration and Naturalization Serv. v. Chadha, 103 S. Ct. 2764, 2774-76 (1983).

[422] Interview with Melvin Goldstein (June 3, 1982).

[423] *See supra* note 342 and accompanying text (Goldstein persuading the Secretary to grant the OHA administrative independence from the ERA).

To the leadership of the Department, the OHA presented a dramatic contrast to the ERA's administrative morass.[425] The OHA produced data and documents quickly, professionally, and efficiently. The staff, painstakingly recruited, selected, and trained by Goldstein, enjoyed an unusually high esprit de corps, a sense of influence, mission, and widely acknowledged excellence. The OHA's procedures facilitated swift case processing and decisions. Because the OHA lacked any programmatic responsibility, processed only individual cases (albeit often important ones), and was relatively insulated from external pressures, many political and administrative constraints that hobble and distract operating agencies like the ERA did not apply to the OHA. Unlike the ERA leadership, Goldstein was not obliged to spend most of his time testifying before Congress, meeting with outside groups, running a large bureaucracy, or conferring with the Secretary and Deputy Secretary. His only job was to "move the caseload," a task that remained quite manageable until the motor gasoline crisis.

Under these circumstances, the DOE's leaders were all too eager for the OHA to fill the regulatory vacuum that the ERA's ineptitude and paralysis had created. In the long run, however, the exceptions process became a fig leaf concealing the incompetence, indecision, and political weakness of the DOE's regulatory apparatus. The OHA was forced to assume broad policymaking responsibilities for which it was not particularly well suited, and the DOE was diverted from making more fundamental administrative and policy changes.

The tactic of deferring to the OHA, of course, did not always succeed. When the DOE first imposed the allocation regulations in 1974, for example, complaints of hardship and inequity flooded the agency. When firms demanded a flexible, low-cost process that could grant prompt relief, they were usually directed to the exceptions office, where they were often disappointed. The exceptions office in those days had developed very stringent standards for relief, sluggish procedures, and an attitude toward applicants that even some energy officials characterized as adversarial, unresponsive, and accusatory. Fearful that its safety valve was jammed and that industry cooperation was being jeopardized, the energy agency created an internal administrative review committee designed to conform exceptions decisions to the agency's larger policy purposes.[426]

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[424] Interview with Hazel Rollins, *supra* note 233; interview with David Bardin, *supra* note 347; interview with John O'Leary, *supra* note 137.

[425] Interview with Hazel Rollins, *supra* note 233; interview with David Bardin, *supra* note 347; interview with John O'Leary, *supra* note 137.

Once the initial shock of the Arab oil embargo abated and the entitlements program was implemented, however, the exceptions process evolved into a more flexible, responsive, and efficient instrument. As the earlier case studies suggest, the exceptions process began to transcend its safety valve functions, designing the specifications of the very regulatory system whose pressures it was supposed to relieve. At this point, certain subtle dangers implicit in its safety valve role began to materialize.

Safety valves, after all, can sometimes function *too* well. By relieving pressures upon a system, they can make the system appear to be performing better than it actually is. This fosters the illusion that all is well. Indeed, safety valves can tempt those who operate the system to forget that the pressures exist at all. The operators may then ignore the conditions that generated those pressures until the safety valve's capacity is exceeded and the system is overwhelmed. The OHA safety valve had precisely this effect, encouraging the DOE to neglect or defer fundamental policy problems that it ought to have confronted and resolved. By undertaking the *Delta-Beacon* adjudications, for example, the OHA relieved the DOE of the necessity to develop a long-run strategy for dealing with the competitive problems of small refiners. Had the DOE addressed the problem systematically instead of in case-by-case adjudications, the Department might have been inclined to ask a broader set of questions and to analyze a more comprehensive set of impacts. In principle, of course, the exceptions process could have been broadened into a kind of rulemaking proceeding similar to those conducted by the ERA. In practice, however, the exceptions process created a context and a psychology likely to affect decisions in subtle but important ways. OHA cases tended to focus attention upon hardship suffered by the individual firm before it, rather than upon effects on the industry as a whole or on consumers generally. Even groups of exceptions cases would tend to deal more with what one official aptly called "the average anomaly" than with the typical situation. For example, the OHA never really addressed the question of the competitive effects of *Delta-Beacon* relief upon those small refiners who did *not* qualify under the OHA's criteria.[427] Even an agency as beleaguered as the ERA probably could not have avoided that basic policy issue for so long had it been obliged to confront it in the context of a rulemaking proceeding.

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[426] Within several years, however, Goldstein managed to disarm this control device. *See supra* notes 135-39 and accompanying text.

By deflecting the modest pressures that were generated under "normal" conditions, the OHA safety valve also helped to conceal fundamental problems in the system of motor gasoline allocations when unusual stress finally exposed the gravity and extent of these problems. Thus, in the Iranian convulsions of 1978-1979, the ERA could not deal effectively with the shortage, while the OHA was utterly inundated by a massive caseload generated by the ERA's anachronistic rules and aborted rulemaking. As a result, the allocation system simply broke down. The strategy of "leave it to Mel," ordinarily quite workable, had actually incapacitated the system from coping with extraordinary demands. In a functional transformation for which the system was wholly unprepared, the OHA safety valve became a floodgate.

One more safety valve function that the OHA performed deserves mention. In addition to encouraging policymakers to avoid the time-consuming and politically hazardous tasks of strengthening and rationalizing the DOE's rules, the exceptions process also affected the kinds of rules that policymakers ultimately and belatedly wrote. Knowing that the OHA was there to dispense situational justice, the ERA could formulate general rules without having to think through fully their effects on individual firms or classes of firms. An example was the 1974 rule eliminating adjustments in the base period allocations to service stations.[428] In the rule's preamble, the ERA acknowledged that its breadth could create difficulties for some stations but casually dismissed that problem on the ground that exceptions relief would be available to handle such cases. Once the 1979 motor gasoline shortage occurred, however, the rule, along with many others issued in the same short period, generated so many hardship and inequity cases that the OHA was overwhelmed and could not provide timely and effective relief.[429]

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[427] *See supra* note 204 and accompanying text. Similarly, a study of the FCC's regulation of cable television found both that the Commission's granting of individual waivers to its "distant signal" rule tended to blind it to the significant policy impact of these waivers in the aggregate, and that the Cable Bureau used that tendency to influence policy through the manipulation of the waiver process. *See* R. BERNER, CONSTRAINTS ON THE REGULATORY PROCESS: A CASE STUDY OF REGULATIONS OF CABLE TELEVISION 21-22 (1976).

A federal court has faulted the Federal Aviation Administration on much the same ground. *See* Delta Air Lines v. United States, 490 F. Supp. 907, 916 (N.D. Ga. 1980)(discussed in Comment, *supra* note 1, at 1138-40).

[428] *See supra* note 274 and accompanying text.

In sum, the OHA performed many different safety valve functions, some of which were almost certainly unforeseen when the exceptions process was created. Each of these functions was a mixed blessing for the regulatory system as a whole. Indeed, the more effectively this safety valve performed, the more it encouraged energy policymakers to rely upon it rather than making necessary improvements in other parts of the system. This led to a self-reinforcing dynamic of incapacity in which more and more of the difficult political choices were made by relatively detached adjudicators who were ill-equipped to make them. At the same time, those policymaking organs with front-line responsibilities were permitted to withdraw and to atrophy.

Short-term pressures made reliance on the exceptions process an attractive expedient. In the long run, however, this arrangement probably weakened the regulatory process. Few officials, however, anticipated that there would be a long run as far as petroleum price and allocation regulations were concerned. Almost all officials expected that whatever had been done could be readily undone and that any errors would soon be rendered irrelevant by the termination of controls.[430] The significance of this delusive anticipation of imminent deregulation can scarcely be exaggerated. It shaped everything that the energy agency did and did not do and the priorities that the agency set. But the demands placed upon the exceptions process also reflected both a false sense of security and a credulous belief that all was well, illusions that safety valves can encourage in people struggling with complexity and uncertainty.

IV. CONCLUSION

It is now possible to offer some answers to the questions about the relationship between the exceptions process and regulatory equity posed at the end of Part I, and to see what meaning can be derived for future administrative design. In the nature of this study, these answers must be tentative, qualitative, and in some cases impressionistic. Moreover, it remains an open question whether and to what extent they can be generalized beyond the kind of regulatory program and exceptions process that the DOE administered. What follows, then, should be regarded as only a first step toward a better understanding of that relationship.

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[429] *See supra* notes 323-25 and accompanying text.

[430] *See, e.g.,* Interview with Frank Zarb, former FEA Administrator (July 28, 1982).

In evaluating the OHA exceptions process and assessing its relevance to the pursuit of regulatory equity in other regulatory settings, three distinctive aspects of the OHA's situation must be borne in mind. First, the OHA purported to make many (though certainly not all) of its decisions under emergency conditions in which expedited decision procedures were thought to be essential and certain external checks, such as rigorous judicial and congressional review, were unavailable as a practical matter. Second, the DOE expected the OHA not simply to achieve regulatory equity, but to help shape a regulatory program of unusual complexity and comprehensiveness. Consequently, the OHA had to operate not on the periphery of regulatory policy but at its very center. The DOE often used the OHA to supplant, not simply to augment, a rulemaking apparatus that appeared to be singularly ineffective. Hence, its policy role was thrust upon it by others, even as it energetically arrogated that role to itself. Finally, the OHA was administered by an unusually experienced and able director, one in whom the DOE's leaders reposed enormous trust. Certain administrative practices that worked tolerably well under Goldstein's administration might, under other leadership and in other circumstances, occasion serious difficulties.

A. *The Problem of Functional Integration.*

DOE exceptions decisionmaking clearly did not confine itself to the conventional goal of such processes—the pursuit of situational justice in particular cases. Instead, the exceptions process constituted a central element, and occasionally *the* central element, of the agency's policymaking apparatus. For many reasons, some more defensible than others, the DOE's leaders delegated to the OHA sweeping discretion and initiative in developing, implementing, and reforming some of the DOE's most important policies, discretion that the OHA aggressively claimed. The direct subsidization of many small refiners and the allocation of ANS crude are among the examples most prominently discussed in this article. These policymaking initiatives by the OHA often took the form, not of equitable criteria, but of what amounted to legislative-type rulemaking.

In general, the OHA managed to perform these broad policy functions without impairing its ability to respond to particular claims of situation-specific injustice. Indeed, the vast majority of its exceptions decisions involved hardship claims of this type, claims having few if any implications for DOE policy generally. It was only during the motor gasoline crisis of 1979, when the ERA's regulatory failures overwhelmed the OHA with myriad hardship claims and related policymaking burdens, that the OHA's ability to dispense regulatory equity was significantly impaired. In this respect, at least, the evidence from the case studies strongly suggests that the mixture of policymaking and equitable functions in one agency was not inherently problematic. Instead, it became problematic only when incompetent policy development and sluggish rulemaking unleashed an avalanche of hardship cases that exceeded the administrative capacities of the exceptions process.

B. *The Problem of Organizational Integration.*

As a matter of formal organizational structure, OHA exceptions decisions and ERA rulemaking were fully integrated. The directors of both units reported to the Secretary and Deputy Secretary of Energy, who were supposed to coordinate the two functions. In practice, however, the OHA and the ERA remained bureaucratically separate to a pronounced degree. The OHA was run with little guidance from or involvement by DOE's politically accountable leadership. Goldstein regarded this autonomy as essential to the OHA's reputation for independent judgment and fairness, and even insisted upon it as a condition of his continued employment. The Secretary and Deputy Secretary seem to have agreed with his assessment.

This separation had significant effects upon the character of both processes. As the case studies reveal, coordination between the OHA and the ERA was often poor. The exceptions process should have been used by the ERA to obtain rapid feedback about the unanticipated consequences of its rules. Instead, the exceptions process was used to perform functions that a more effective rulemaking process would have discharged itself. Some of the OHA's decisions seemed detached and remote from the operational, administrative, and programmatic factors to which the ERA was institutionally sensitive.[431] Moreover, the DOE's promiscuous use of exceptions as an all-purpose "safety valve" probably weakened the ERA, though in an attempt to help it. The DOE was able to put off the hard political and bureaucratic choices needed to rehabilitate the ERA as an effective policy instrument.

It is not at all clear that a greater structural integration of the OHA and the ERA would have produced "better" policies and decisions by each. First, permitting the same official to administer the rulemaking process and to decide exceptions cases might simply lead to a new separation within that official's unit. The advantages of specialized functions, after all, can only be realized by developing different kinds of personnel, operating procedures, performance criteria, and professional-technical skills. Even within a single agency, such differentiations are likely to fragment the organization in ways similar to those that made the integration of the OHA and the ERA so problematic. There are severe limits to the ability of structural reorganization to transcend differences that are deeply rooted in specialized functions, perspectives, operating routines, and training.

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[431] An example of this is the *Ohio Independents* ruling and the 1979 class exception implementing the "unusual growth" adjustment. Professor Strauss found in the Department of the Interior an even more pronounced isolation of policy-relevant adjudicators from officials with policy responsibility, with similarly problematic results. *See* Strauss, *supra* note 70, at 1254-64.

Second, informal devices for bridging the structural separation between the OHA and the ERA were readily available.[432] If they were not used effectively, if the well-defined personalities and political dynamics in the DOE policy process neutralized their effects, it is difficult to believe that formal changes alone would have much altered that process or its outcomes.

On the other hand, separation did have some important benefits, especially for the exceptions process, that at least partly offset the disadvantages. Public acceptance of the OHA's more far-reaching exceptions decisions, for example, may have been enhanced by its structural independence, which strengthened its claim to be engaged in an essentially adjudicatory, nonpolitical process. As suggested earlier, this claim was grossly exaggerated in those cases, such as *Delta-Beacon*, in which the OHA was essentially making legislative policy. Even then, however, there was always *something* to the claim.[433] In fact, the OHA *was* relatively free of the political, bureaucratic, and programmatic pressures that shaped (and impeded) decisions in other parts of the DOE. In a situation in which the reform of energy policy seemed paralyzed by political deadlock, the OHA's relative independence doubtless facilitated movement and contributed to the grudging respect with which even most of the OHA's critics regarded its work. The OHA was prepared to make difficult decisions at a time when even a wrong decision might be preferable to continuing uncertainty and inaction. Its willingness to do so was, at least in part, a function of its relative independence.

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[432] Possibilities include more frequent consultation, a greater willingness or capacity by the Department's political leaders to play a more active coordinating role, or a better system for clearing OHA decisions.

[433] *See supra* notes 157-59 and accompanying text.

C. *The Problems of Equitable Criteria and Legitimacy.*

Occasionally, as in its *Delta-Beacon* standards, the OHA did manage to crystallize its decision criteria into rule-like form. The necessity for administering what amounted to a broad subsidy program demanded far more predictability and uniformity of treatment than did the typical OHA "hardship" exceptions. The latter tended to be highly fact-specific and idiosyncratic. But for the most part, the criteria that guided the OHA's broad equitable discretion remained scarcely more specific than the vague statutory criteria: "special hardship," "inequity," and "unfair distribution of burdens." As a result, the exceptions process successfully retained the equitable character, situational orientation, and decisional flexibility for which it was originally created. It did so, of course, at the risk of appearing to decide in an unpredictable and unprincipled manner.[434]

Agency decisions that confer valuable advantages upon one or a few firms vis-a-vis their competitors or the general public can easily be impugned as being motivated by the prospect of narrow partisan advantage, personal favoritism, or otherwise illegitimate reasons. An exceptions process that provides special relief from valid, binding rules with which other firms must comply at considerable cost, is especially open to such criticisms. The OHA, whose decisions often conferred enormous economic, competitive, and political benefits upon particular firms, regions, or sectors, was unusually sensitive to this problem.[435]

In these circumstances, the OHA's reputation for integrity and nonpolitical decisionmaking was a precious asset. If the views of many lawyers who practiced before the agency are a reliable guide, the DOE succeeded rather well in preserving its reputation. The OHA's director and staff earned and retained high marks for administrative competence, analytical rigor, scrupulous honesty, and independence. The merits of some OHA decisions were extremely controversial. Moreover, many of those interviewed complained of the agency's arrogant personnel, informal decision procedures, and eagerness to press its powers to (or even beyond) valid limits. None, however, questioned the integrity or legitimacy of its decision process. By all accounts, the OHA decided cases on its view of the merits, without regard to partisan or other inappropriate considerations.

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[434] In an earlier study of the Department of the Interior's adjudication of land claims, Professor Strauss identified a similar failure of the adjudicators to state their standards in the form of readily accessible rules, although the standards were susceptible to such codification. He suggested a number of procedural reforms to encourage the adjudicators to do so, including creating a separate office to state policy in rule form, or permitting outside parties to stimulate such codification. As Strauss pointed out, however, such reforms are unlikely as a practical matter to induce rulemaking that the agency wishes to avoid. *See* Strauss, *supra* note 70, at 1266-69.

[435] The initial *Ashland* decision alone was worth over $50 million to the company. The *Ohio Independents* decision was worth $14 million, and might have affected President Carter's electoral strength in Ohio. *Delta-Beacon* relief, eventually amounting to $300 million annually, protected some small refiners and their customers from extinction, and significantly drained the valuable entitlements pool. *See supra* notes 192-93 and accompanying text.

The absence of vice, of course, is not quite the same as the presence of virtue. The case for an exceptions process like OHA's cannot rest upon mere scrupulousness. Nevertheless, the OHA's reputation for integrity and competence is no trivial matter. It represents a considerable administrative achievement in an era of widely perceived bureaucratic failure and in a regulatory program often denounced for both incompetence and susceptibility to narrow political pressures.

It is also important to recognize, however, that this achievement probably cannot be readily replicated. The OHA's structural separation, adjudicatory image, and relative independence may have facilitated its success, but they could not assure it. The energy lawyers who were interviewed seemed convinced that the OHA's legitimacy would have been in far greater jeopardy had someone less able and scrupulous than Melvin Goldstein been administering the exceptions process. This is both a crucial consideration and a troubling one. Any decision process whose integrity and public acceptability depend critically upon the idiosyncratic personality of the individual who happens to be running it at the time must give one cause for concern. Public officials like Goldstein, many observers emphasized, are in short supply in public agencies today—or in *any* day. The legitimacy of an exceptions process can neither be left to the character of its leadership nor be rendered immune from that influence. It must instead be addressed institutionally, largely by means of adequate procedures and external controls.

D. *The Problem of Procedures.*

The earlier discussion of OHA procedures suggests that they are inadequate in certain respects.[436] Each deficiency deserves detailed analysis before a particular remedy is selected, and most plausible remedies would probably slow the decisionmaking process to some extent. Consideration should be given to changes that would: assure timely notice to all interested parties; permit adequate but appropriately controlled discovery at an early stage of the case; regulate ex parte communications; limit hearsay testimony by lawyers, especially when testimony by employees with direct knowledge of the facts is feasible; establish safeguards to minimize the risk that interim exceptions relief, once granted, will become permanent de facto, if not de jure; assure effective administrative review of exceptions decisions; separate the exceptions function from the function of reviewing remedial and enforcement orders; and encourage participation by significantly affected but inadequately represented groups.

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[436] *See supra* notes 354-410 and accompanying text.

Perhaps the most troubling and systematic of the OHA's procedural defects arose from a *substantive* commitment—its simultaneous pursuit of both regulatory equity and policy influence. The process of common law-type adjudication, while reasonably well suited to regulatory equity, was poorly adapted to broad policymaking. First, because the APA's adjudicatory safeguards did not apply to the OHA,[437] this approach engendered numerous legal challenges by regulated firms. Although these challenges were largely unsuccessful, the adjudicatory forms that the OHA employed gave a certain plausibility to many of these complaints. In that sense, the OHA was hoist by its own petard. Having wrapped itself in the mantle of judicial detachment, the OHA exposed itself to claims that it should conduct itself like a court. Second, and probably more important, its adjudicatory procedure, even in the hybrid form that emerged, was incapable of creating the analytical, evidentiary, and political bases necessary to sustain the broad policy development and implementation tasks that it all too eagerly assumed.

This is an inherently difficult problem, one that seems endemic to any decisionmaker that takes on two such disparate administrative tasks and performs them simultaneously—indeed often in the same proceeding. It is especially difficult when circumstances and personalities render the most obvious solution—the distribution of these tasks to two administrative units with different procedures, regulatory responsibilities, and claims to legitimacy—impractical, if not impossible. When the exceptions office undertakes to make broad policy decisions through adjudication, the predictable result is that it will adopt a decision mode that falls between two procedural stools.

The OHA's compromise, developing policy through adjudicatory forms lacking the conventional adjudicatory safeguards, was vulnerable to several different types of criticisms. In *Ashland*, for example, the summary nature of the OHA's decision process raised serious questions about the fairness of the proceedings to those opposing relief.[438] In addition, the need to reduce Ashland's relief substantially on three subsequent occasions suggests that the process yielded a hearing record inadequate to support the complex policy judgments that were required. Similarly, in *Ohio Independents*, the OHA's truncated hearing procedures led to a remedy whose lack of programmatic and political acceptability could be traced, in part, to the narrow focus of the adjudicatory forum in which it was devised. It is almost inconceivable that such a result would have emerged from a rulemaking proceeding, even one conducted under expedited procedures. In that event, the ERA's rule on ANS crude pricing apparently handled the problem.

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[437] *See supra* notes 355-58 and accompanying text.

[438] These are questions that the reviewing court might well have resolved against the agency had it known that the "temporary" relief would last two and one-half years.

Such unsatisfactory policy results should not be surprising. As was demonstrated in Part I, a regulatory agency is organized to function as an engine of policy in ways that a court is not.[439] The same, however, cannot be said of the agency's specialized exceptions adjudicators. The OHA's procedures, although adapted in an effort to support its policymaking role, were still constrained and characterized by the narrow, adjudicatory format of its decision process.[440]

Indeed, with respect to the typicality of cases, exceptions adjudication by an agency may be even more poorly suited to broad policy development than traditional common law adjudication by a court.[441] Almost all cases that come before common law courts are those in which both parties claim that they want to be governed by the existing rules. In contrast, those that came to the OHA were, by definition, "exceptional"; they were cases in which the applicant claimed that the existing rules were inadequate or unjust. When adjudicatory records emphasizing such unusual circumstances are the basis for broad policy decisions, those decisons are likely to reflect a somewhat distorted or inadequate view of the relevant social reality.

If policymaking through exceptions adjudication is deeply problematic, it does not follow that informal rulemaking is always superior. Many exceptions decisions may be located toward the center of the hardship/policy exceptions continuum, where adjudicatory procedures may still exert a powerful attraction. Others may have an important policy dimension that becomes apparent only after the exceptions proceeding is well under way or even completed. In still others, policy development through adjudication rather than rulemaking may represent sound social process as well.[442]

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[439] *See supra* notes 63-67 and accompanying text.

[440] *See supra* notes 409-10 and accompanying text.

[441] This point is developed in a May 1983 letter to the author from Professor Martin Shapiro. Of course, the typicality of cases that come before judges, especially in public law litigation in the federal courts, should not be exaggerated. *See* P. SCHUCK, *supra* note 57, at 157-58.

[442] *See, e.g.,* Diver, *supra* note 43, at 399-400, 428-30; *see also* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 770-74 (1969)(Black, Brennan, Marshall, J.J., concurring).

The quest for a single solution to this problem is the administrative equivalent of the search for a philosopher's stone. It is doomed to failure. Indeed, even to portray the problem as a procedural one may be quite misleading; as suggested in Part I, the procedural difficulty may merely be epiphenomenal, symptomatic of a fundamentally intractable or misguided substantive regulatory mission.[443]

Even accepting that possibility, however, the general outlines of a "second best" system for exceptions decisions emerge from the OHA's experience.[444] First, Congress or the agencies should establish a richer array of procedural options, a set of alternative decision modes that mirror the diverse mixture of competing values presented by different kinds of exceptions decisions: fairness to individual firms and consumers, accuracy, speed of decision, policy sensitivity, the substantive interests at stake, the kinds of issues to be resolved, the kinds of procedures originally employed to generate the rule from which relief is sought, and political accountability, among others. The formal adjudication and informal rulemaking categories established by the APA are merely end points on a spectrum of procedural formality. They do not begin to exhaust the possibilities for procedural hybrids, much less new species.

Energy regulation had to be conducted in a most extraordinary policy context. It consisted of extremely dynamic, heterogeneous, unpredictable, and interrelated markets and a sluggish political-administrative apparatus paralyzed by a nearly impossible task, overwhelming complexity, and political stalemate. This regulatory world had surprisingly little in common with the one in which the APA was enacted almost forty years ago, or even with those in which the Securities and Exchange Commission or National Labor Relations Board regulate today. Energy policy decisions had to be made and changed much faster than informal rulemaking, as a practical matter, permitted. They also had to be made with a much broader base of information, expertise, political acceptance, and legitimacy than exceptions adjudications could mobilize even with the OHA's innovative procedures.

This kind of regulatory context, at least, seems to call for some new procedural variants. As informal rulemaking becomes increasingly encrusted with judicialized procedures and other extra-APA requirements in the name of "regulatory reform,"[445] the importance of a relatively expeditious, flexible, and discretionary policymaking instrument such as that originally envisioned by section 553 of the APA becomes that much greater. It might, for example, take the form of a more summary rulemaking proceeding leading to temporary rules that would automatically "sunset" after a limited period, thereby ensuring periodic policy review by the agency. Emergency interim relief granted through such rules or in an exceptions proceeding should be conditioned upon creation of an escrow fund, interest obligation, expiration date, or other mechanism to ensure that the status quo ante can be effectively restored in the event that the agency or reviewing court subsequently determines that such relief was erroneous.

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[443] *See supra* note 96 and accompanying text.

[444] *See also* P. SCHUCK, *supra* note 50, at 187-90.

[445] *See supra* notes 86-89 and accompanying text.

If the agency provides more procedural alternatives to administrators, the decision to select among them becomes correspondingly significant. Greater attention, therefore, should be devoted both to the criteria that should guide what must inevitably be a discretionary choice of procedural modes,[446] and to the need for flexible adaptation in the light of new information. If after an essentially adjudicatory exceptions proceeding is commenced, for example, it appears that significant policy issues are implicated, the exceptions office might be required to inform the rulemaking office promptly in order to give the primary policymaking apparatus an opportunity to supplement or supplant the exceptions proceeding.[447] If, however, the exceptions office proceeds with the case, it should seek to broaden public participation in its adjudication, inviting public comments on all significant policy, factual, and remedial issues in the case and conducting the proceeding in much the same way that a rulemaker would. In that event, the exceptions tribunal might be augmented by members drawn from the agency's policymaking organs.

E. *The Problem of Accountability and Control.*

To a degree unusual in public agencies exercising politically controversial and policy-significant power, the DOE exceptions process was autonomous. Neither the administrative review committee nor the departmental leadership was significantly involved in even the most important OHA decision, with the notable exception of the *Ohio Independents* case. The DOE's program offices seldom participated in OHA's proceedings, at least formally. White House clearance of OHA orders, including those carrying broad economic and political consequences, was rare. Congressional oversight of the exceptions process was virtually nonexistent; one committee hearing was held during the motor gasoline crisis, and that had no observable effect. OHA easily deflected pressure from individual members of Congress and circumvented Congress's few statutory directives concerning OHA procedures. The complexity and "emergency" nature of the OHA's exceptions decisions elicited from the courts an abject deference years after the regulatory program had been established and the initial crisis had passed.

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[446] For a discussion of these criteria, see Aman, *supra* note 6, at 293-322.

[447] At least the office should be so encouraged because, in practice, the requirement is unlikely to be judicially enforceable.

The OHA's substantial freedom from external controls had many advantages for the DOE. For that reason, the department's political leaders not only tolerated this autonomy but encouraged it. This reflected both their confidence in Melvin Goldstein's decisions and their perception that a relatively independent OHA constituted a valuable safety valve for a variety of internal and external pressures that had accumulated around the regulatory program. In a different context, of course, stricter bureaucratic controls might well have been imposed.

To the extent that an agency's leaders wish to delegate such autonomy to inferior officials, there is probably little that administrative law can or should do to inhibit that delegation, so long as their ultimate accountability to the politically responsible agency head is preserved. Similarly, there is no way to compel Congress to take greater interest than it chooses to in the decisions of a particular agency. It is probably futile to expect Congress to conduct continuous and effective oversight of an exceptions process, even one as far-reaching as the DOE's. Only the most visible and politically explosive breakdowns, such as the motor gasoline crisis, are likely to engage Congress's sustained attention. Judicial oversight of exceptions decisions is likewise problematic, especially in the context of a perceived programmatic emergency.

If an exceptions process like the OHA's is to be subject to meaningful external checks, if its performance is not to depend excessively upon the unusual talents of one individual, more systematic controls must be devised. These controls should safeguard the full range of values that the exceptions process is supposed to pursue. One possible reform is to encourage greater formal involvement by officials responsible for policy formulation and implementation. The Secretary, for example, could be required to sign off on exceptions decisions that meet certain criteria of significance. Obviously, such a requirement could be routinized and rendered pro forma, thereby defeating its purpose. Even if that occurred, however, accountability for policy decisions would be focused where it belongs. Alternatively, the agency's program offices could be given a formal, party-like role in the adjudicatory proceeding itself, through which they could apprise the exceptions office and the Secretary of important policy differences at a stage in the process early enough to influence the outcome. Reviewing courts, for their part, could take a more skeptical attitude toward "emergency" justifications for otherwise objectionable administrative procedures, especially as the regulatory program matures.

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BIBLIOGRAPHY

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: A BIBLIOGRAPHY

1968–1983

Sue Judith Boley*

The Administrative Conference of the United States was established by public law in 1964 as a permanent, independent federal agency to study the efficiency and fairness of the administrative processes in the federal government, and to recommend improvements to the President, the Congress, the agencies concerned, and the Judicial Conference. Since the appointment of its first chairman in 1968, the Administrative Conference has addressed a wide variety of topics ranging, for example, from a congressionally mandated study of the rulemaking procedures of the Federal Trade Commission to a number of projects exploring various provisions of the Freedom of Information Act.

Topics for inquiry may be chosen by the Chairman of the Conference, the Council, the committees, and the Assembly.† In most cases a consultant is hired to perform in-depth research in the area of concern. The consultant and staff of the Office of the Chairman work closely with Conference committees in drafting recommendations to be considered for adoption by the Assembly. The Assembly may approve, amend, remand, or reject recommendations presented by committees. Adopted recommendations may result in new congressional legislation or direct action on the part of the affected agencies.

The product of the Conference takes two principlal forms: staff or consultant reports, and Conference recommendations and statements. Recommendations and statements adopted by the Assembly are published in the *Federal Register* (Fed. Reg.), and in most cases (depending on continuing general interest) in the *Code of Federal Regulations* (recommendations at 1 C.F.R. § 305, statements at 1 C.F.R. § 310). Staff and consultant records often are published as periodical articles or monographs, or serve as the basis for such publications.

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*Librarian and Information Officer, Administrative Conference of the U.S. Earlier bibliographies apeared at 30 AD L. REV. 303 (1978) and 33 AD. L. REV. 235 (1981).

†For further information about the organization of the Administrative Conference see: [1982] ACUS ANN. REP., Wash., D.C., U.S. Gov't. Printing Office (Superintendent of Documents No. Y3. Ad6:1/1982). *See also* 1 C.F.R. §§ 301.1 to 310.10.

Texts of all recommendations and statements and the reports that led to them, are published in a four-volume series entitled *Recommendations and Reports of the Administrative Conference of the United States* and its successor series, *Administrative Conference of the United States: Recommendations and Reports* (both hereinafter cited as ACUS). Full texts of adopted recommendations and statements also appear in the corresponding annual report of the Administrative Conference. Miscellaneous staff and consultant reports not leading to formal recommendations and not published in journals or monographic form are made available for distribution by the Conference.

This bibliography covers the major work of the Conference from its first Plenary Session in May 1968 through the twenty-seventh Plenary Session in December 1983. During this period 97 recommendations were adopted along with 10 formal statements, all of which were based on reports prepared by consultants, staff, or committees. Included herein are 162 reports of consultants and staff (committee reports excluded): 88 of these resulted in recommendations and 9 led to Conference statements.

Each entry includes the author, title, and article citation(s). In those cases where the report was published in a journal as well as in a volume of ACUS, the title is shown as it appears in the journal. Early volumes of *Recommendations and Reports of the Administrative Conference of the United States* are cited as 1 ACUS ______, 2 ACUS ______, etc. References to reports that are included in continuing volumes of ACUS (published in yearly compilations beginning with 1978) are cited as 1978 ACUS ______, 1979 ACUS ______, etc.

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The purposes of this bibliography are to acquaint the researcher with the work of the Administrative Conference and to assist in locating reports by supplying the appropriate bibliographic information. Reports should be obtained directly from their published source in lieu of requesting them from the Administrative Conference. The four-volume series, *Recommendations and Reports of the Administrative Conference of the United States* (Superintendent of Documents classification number Y3 Ad6:9), and its successor series, *Administrative Conference of the United States: Recommendations and Reports* (also Y3 Ad6:9), can be found in most government depository libraries.

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